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No. _____

In The

Supreme Court of the United States

GREENSPRING RACQUET CLUB, INC.;
WILLIAM HIRSHFELD; and LORETTA HIRSHFELD,

Petitioners,

v.

BALTIMORE COUNTY, MARYLAND,
a body corporate and Politic,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a regulatory takings claim based on a land use ordinance's failure to substantially advance a legitimate state interest is *categorically barred* whenever the regulation is an "ordinary zoning restriction" limiting height and density and when "statements by local lawmakers set out legitimate reasons" for imposing the height and density restrictions? (App. 12-13, 14).

2. In light of *Olech v. Village of Willowbrook,* is a land use ordinance creating irrational and wholly arbitrary classifications and motivated by malice, bad faith and retaliatory intent immune from a claim that it violates the equal protection clause?

3. In light of *Williamson County Reg. Plan. Comm'n v. Hamilton Bank,* may federal causes of action be dismissed for failure to state a claim upon which relief can be granted notwithstanding litigant's request to stay all proceedings in federal court until the causes of action are "ripened" in state court and litigant's express "reservation" in the state action of all federal claims which may be subsequently pursued?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties are listed in the caption.

Greenspring Racquet Club, Inc. has neither parent nor subsidiary companies.

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PETITION FOR WRIT OF CERTIORARI

Greenspring Racquet Club, Inc. and William and Loretta Hirshfeld respectfully petition for a Writ of Certiorari to review a final judgment and order of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The decision of the Fourth Circuit Court of Appeals was filed on October 31, 2000, and was not recommended for publication; it appears at App. 1-24 to this Petition. On January 3, 2001, a motion by Respondents to publish the Fourth Circuit's opinion was denied. The decision of the district court was filed on September 27, 1999 and is reported as *Greenspring Racquet Club, Inc. v. Baltimore County*, 70 F.Supp.2d 598 (D.Md. 1999); it appears at App. 27-46 to this Petition.

JURISDICTION

This case arises from the lower courts' refusal to follow principles of regulatory takings and equal protection law as decided by this Court as well as the lower courts' failure to recognize their obligation to abstain from deciding the merits of claims which, pursuant to the directives of this Court, must first be fully litigated in state court before federal jurisdiction is conferred. The Fourth Circuit's opinion was entered on October 31, 2000.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fifth and Fourteenth Amendments to the United States Constitution, along with pertinent federal statutes, are reproduced in App. 109-120.

STATEMENT OF THE CASE

Petitioners Greenspring Racquet Club, Inc. and William and Loretta Hirshfeld (collectively "Greenspring") have battled Baltimore County, Maryland ("the County") for several years for the right to redevelop a 5.5 acre parcel of land within an established, major commercial office center. The Property is owned by the Hirshfelds and leased to Greenspring Racquet Club, Inc. which, since 1976, has operated a tennis club on the site. In June 1998, Greenspring amended the original site plan to propose razing the aging tennis barn and construct in its place two adjoining office buildings of five and six stories with attached parking facilities. (App. 4). Greenspring's redevelopment efforts were thwarted by various efforts of the County; the most onerous being an arbitrary and irrational legislative enactment designed to single out

Greenspring's property. Such ordinance was the result of conspiratorial collaboration between the County and certain adjacent and nearby property owners who were, based upon their own economic self-interests, opposed to Greenspring's project. (App. 89, ¶ 44). The district court found and the Fourth Circuit affirmed that, as a matter of law, this restrictive Ordinance although enacted in bad faith retaliation to Greenspring's redevelopment initiative, substantially advanced a legitimate state interest and thus failed to state a facial claim for a regulatory taking. The courts also held that Greenspring's allegations of arbitrariness and bad faith were insufficient to state a claim upon which relief could be granted under the equal protection clause. Because Greenspring did not prevail in the Fourth Circuit they seek relief from this Court for the constitutional errors committed by the lower courts.

A. Factual Background.

Since 1976 Greenspring has operated a tennis club consisting of a single, corrugated steel tennis barn structure on the subject property. In 1998 Greenspring undertook what would become a futile attempt to utilize the full potential of the Property's "Business Major" ("BM") zoning classification which permits, as a matter of right, office buildings as high as 100 feet with a maximum floor area ratio ("FAR") of 4.0.

After amending the previously approved 1975 tennis club site plan to reflect the office building redevelopment, Greenspring went to the Baltimore County Development Review Committee ("DRC") seeking an exemption

("(b)(9) exemption") from portions of the development plan approval process which would allow them to proceed directly to building permit. (App. 5). Although Greenspring demonstrated compliance with all the requirements for this exemption, the request was denied.

In response to Greenspring's redevelopment proposal and at the behest of Greenspring's self-interested neighboring property owners, the County adopted on October 5, 1998 Bill 111-98 ("the Ordinance"). (App. 89, ¶ 44; 91, ¶ 50). The Ordinance restricts building heights to 35 feet and a maximum FAR of .5.[1] Its restrictions, however, apply only to property such as Greenspring's zoned "Business Major" ("BM"), "Business Light" ("BL"), or "Business Rural" ("BR") when the exterior wall of any proposed building lies within 750 feet of a "Resource Conservation Zone." (App. 5). Property zoned "Office Building – Residential" ("OR"), "Office and Technology" ("OT"), "Manufacturing Light" ("ML"), "Manufacturing Heavy" ("MH") or "Manufacturing Light, Restricted" ("MLR"), which permit similar or more intensive uses than those permitted in business zones, were unaffected by the Ordinance regardless of how close a building may be to a Resource Conservation Zone. (App. 81, ¶¶ 19-20). The Ordinance destroyed Greenspring's office development capacity and fails to substantially advance its avowed purpose of protecting resource conservation zones. (App. 83, ¶ 25). Such failure is occasioned by the very terms of the Ordinance which prevent a BM zoned property from constructing a building that exceeds 35

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[1] The impact of the ordinance on Greenspring's property was to reduce the property's use and value by 95.6%. (App. 9).

feet and .5 FAR within 750 feet of a Resource Conservation Zone while permitting, without exception, construction of buildings far in excess of those limits immediately adjacent to a Resource Conservation Zone so long as it is zoned office or manufacturing. This scheme creates an irrational and arbitrary classification that fails to advance any legitimate government interest. (App. 97, ¶ 63).

Following the adoption of Bill 111-98, Greenspring requested a rezoning from BM to "Office/Residential-2" ("OR-2") so as to be removed from the scope of the ordinance. The Baltimore County Planning Board denied Greenspring's request in March of 1999. (App. 6). Greenspring again sought relief from the DRC by seeking both a (b)(9) exemption which would permit Greenspring to proceed directly to building permit and an exemption under Bill 111-98 which would allow redevelopment within the same "footprint" as the existing improvement so long as the new building had equal or less square footage per story as the existing building. To support this request, Greenspring submitted a revised site plan for one eight-story office building with attached parking that met all the requirements for a "footprint exemption". In May of 1999 the DRC held an open meeting to consider both requests for relief and failed to grant either remedy. (App. 6-7).

B. Judicial Proceedings.

On June 26, 1998, Greenspring filed a complaint in the Circuit Court for Baltimore County seeking *mandamus*, declaratory and injunctive relief from the DRC's denial of its original request for a (b)(9) exemption. (App.

5). After the County adopted Bill 111-98 Greenspring amended the complaint to include damage and compensation claims based on the Ordinance's failure to advance any legitimate state interests, creation of irrational and arbitrary classifications, and the retaliatory, bad faith motive for the Ordinance. To preserve its federal causes of action for later review in federal court, Greenspring included a "*Jennings-Fields* Reservation" of those claims. (App. 6).

In February 1999, the County removed the state court case to federal district court where it was dismissed with leave to file an amended complaint and with leave "to seek a stay pending exhaustion of all state law claims" in a newly filed state court action. (App. 25-26). Greenspring filed an amended complaint in district court (App. 74-109) and *requested a stay pending resolution of the state court action*. (App. 62-73). The amended complaint alleged, *inter alia*, that Bill 111-98 on its face and as applied to Greenspring's property effected a taking of the property without just compensation because it was adopted in bad faith and in retaliation to Greenspring's development application (App. 91, ¶ 50), and therefore, did not substantially advance a legitimate state interest as required under *Agins v. City of Tiburon*, 447 U.S. 255 (1980). The amended complaint also alleged that the Ordinance, on its face and as applied to Greenspring's Property, violated the equal protection clause because it treated similarly situated properties with the same potential for endangering Resource Conservation Zones differently as the result of personal ill will, bad faith and retaliatory intent to harm Greenspring. (App. 97, ¶ 63-64).

Greenspring's remaining counts sought relief for violation of procedural due process, economic taking of the Property based upon the as-applied effects of the ordinance, and violation of substantive due process, both facial and as applied.

On June 7, 1999 the County filed a Rule 12(b)(6) motion to dismiss. Wholly ignoring Greenspring's protests and Motion to Stay, the district court dismissed the entire amended complaint with prejudice (App. 27-46), and granted thereafter an award of attorney's fees to the County pursuant to 42 U.S.C. § 1988. (App. 47-61).

The Fourth Circuit Court of Appeals affirmed the district court's dismissal on all counts except Greenspring's as-applied takings claim which the Fourth Circuit held should not have been dismissed because it was not yet ripe and therefore the court lacked subject matter jurisdiction. (App. 12). For the same reason, the Fourth Circuit vacated the award of attorney's fees since such award necessarily included legal fees attributable to Greenspring's as-applied taking claim which could not be adjudged frivolous for want of subject matter jurisdiction over it. (App. 23).

SUMMARY OF ARGUMENT

In affirming the district court's dismissal, the Court of Appeals found, as a matter of law, that land use ordinances are immune from takings claims under the first prong of *Agins* if a legitimate reason for the ordinance is given by a single legislator. In the words of the court "[t]he

height and density limits contained in Bill 111-98 are ordinary zoning restrictions and, quite obviously, they substantially advance a legitimate state interest. . . . " (App. 12-13). Furthermore, in the Fourth Circuit's opinion, "[w]hen statements by local lawmakers set out legitimate reasons for imposing height and density restrictions on property in a particular class of zones, there can be no claim in federal court that the law fails to substantially advance a legitimate purpose." (App. 14). The Court of Appeals' analysis of the first prong of *Agins* began and ended with the initial step of finding a legitimate state interest for adopting the regulation. It clearly ignored the legal and factual issues to be determined in the second step – whether the regulation adopted substantially advances the legitimate state interest.

It has long been recognized by this Court that a land use regulation effects a taking of property if (1) the regulation fails to substantially advance a legitimate state interest; *or* (2) the regulation denies a property owner economically viable use of his land. *See, e.g., Agins*, 447 U.S. at 260; *Keystone Bituminous Coal Ass'n v. De Benedictis*, 480 U.S. 470, 485 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-16 (1992); *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 704 (1999). Although no standard has ever been provided by this Court regarding the nature of the requirement that a land use ordinance substantially advance a legitimate public interest, it is intuitive that this Court intended the standard to garner more respect than that afforded by the Fourth Circuit.

If the Fourth Circuit's opinion is an accurate statement of regulatory takings law, proclamations of legitimate reasons for adopting land use ordinances may serve as the pretext for bad faith, retaliatory or corrupt legislative motives and will automatically defeat any taking claim based upon a failure to substantially advance a legitimate state interest. Unmitigated deference to the stated rationale of local governments is antithetical to this Court's repeated pronouncement that regulatory takings cases "necessarily entail complex factual assessments of the purposes and economic effects of government actions." *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992).

This Court in *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687 (1999) rejected such immunity in the context of "land-use decisions" as "contrary to settled regulatory takings principles." *Id.* at 707. To accept such immunity for land use regulations would be equally contrary to established regulatory takings principles and should be rejected.

Petitioners urge the Court to either clarify the standards applicable to the "substantially advance" test of *Agins* or overrule *Agins* and *Del Monte Dunes* and every other decision by this Court which recites the principle of substantial advancement.

In holding that Greenspring's allegations of arbitrary classifications motivated by personal ill will, bad faith, and retaliatory intent were insufficient to state an equal protection claim, the Fourth Circuit ignored the importance of this Court's recent decision in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). After accurately

stating the holding in *Olech* that allegations of an "irrational and wholly arbitrary" zoning decision were sufficient to state an equal protection claim, the Fourth Circuit circuitously stated that "[b]ecause the local zoning decision at issue in the instant case is not 'irrational and wholly arbitrary,' Greenspring's complaint is easily distinguished from the complaint at issue in *Olech*." (App. 17 n.4). Instead of evaluating whether Greenspring's allegations, deemed true under a Rule 12(b)(6) motion, stated a sufficient claim under the Equal Protection Clause, the Fourth Circuit made a conclusory determination on the merits of the case and on that basis adjudged the allegations insufficient. This result is patently inconsistent with the *Olech* decision. The Court should take this opportunity to define and clarify the true import of *Olech* and overturn the Fourth Circuit's opinion as being in clear conflict with that decision.

The circuitous enigma that is the ripeness doctrine poses a substantial obstacle to property owners in constitutional land use cases and if wrongly applied can pose "a trap" for the unwary who seek to comply with its requirements.[2] Despite their cautionary attempt to

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[2] *See, e.g., Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) ("*Williamson County*"); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989) ("ruling case law makes it very difficult to open the federal courthouse door for relief from state and local land use decisions."); *Private Property Rights Implementation Act: Hearings on H.R. 1534 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong., 1st Sess. 1-4 (1997) (discussing survey results which indicate 81% of as-applied takings claims decided in lower federal courts between 1990

negotiate the procedural thicket spawned by this Court's decision in *Williamson County Reg. Plan. Comm'n v. Hamilton Bank* and the Circuit Courts' attempt to implement its directives, Greenspring was denied the opportunity to litigate its federal causes of action. The Court's clarification and guidance is urgently needed so lower courts can accurately apply *Williamson County* and litigants can utilize the correct procedures to preserve federal claims for adjudication in federal court after first ripening those claims in state court.

REASONS FOR GRANTING THE WRIT

I. THE STANDARDS GOVERNING THE REQUIREMENT THAT A REGULATION SUBSTANTIALLY ADVANCE LEGITIMATE STATE INTERESTS IS AN IMPORTANT AND RECURRING QUESTION OF REGULATORY TAKINGS LAW THAT HAS NOT BEEN SETTLED BY THIS COURT

In *Agins*, this Court held that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not *substantially advance* legitimate state interests, see *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138, n.36 (1978)." *Agins*, 447 U.S. at 260 (emphasis supplied). In the twenty years since *Agins* was decided, this Court has repeatedly acknowledged that the

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and 1997 never reached the merits and more than 50% of those who pursued appeals had their takings claims dismissed as unripe).

case accurately states regulatory takings law. See *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 647 (1981); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985); *Keystone Bituminous Coal Ass'n v. De Benedictis*, 480 U.S. at 485; *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Pennell v. City of San Jose*, 485 U.S. 1, 18 (1988); *Yee v. City of Escondido*, 503 U.S. at 534; *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1015-16; *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. at 704. However, in these twenty years of repeated citation to the case and its two pronged takings analysis "this Court has [never] provided . . . a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions." *Del Monte Dunes*, 526 U.S. at 704.[3] There has certainly been instructive discussion of the issue, but the time has come for the Court to clarify the standards necessary to "substantially advance legitimate state interests."

In *Nollan*, this Court recognized that "[o]ur cases have not elaborated on the standards for determining . . . what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter," but offered a clear statement of what type of connection did not satisfy the

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[3] The nature and applicability of the "substantially advance" test in the context of required dedications and exactions is discussed at length in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

requirement. 483 U.S. at 834. The level of connection must be greater than the deferential "rational basis" standard employed in due process and equal protection analysis. *Nollan*, 483 U.S. at 834 n.3. In the instant case, neither the district court nor the Fourth Circuit even so much as applied a rational basis level of scrutiny. Their analysis began and ended with the initial step of finding a legitimate state interest for the local government's adoption of the regulation. It clearly ignored the logical and legally required second step of determining whether the regulation actually adopted substantially advanced that interest.

In *Del Monte Dunes*, the Court undertook an examination of whether the issue of "substantially advancing" was a question of fact for a jury to decide or whether it could be decided as a matter of law by the court, and found that the "narrow, factbound question" of "whether, when viewed in light of the context and protracted history of the development application process, the city's decision to reject a particular development plan bore a reasonable relationship to its proffered justifications" was properly submitted to the jury. *Del Monte Dunes*, 526 U.S. at 721. However, the Court qualified its decision with the caveat that "we do not attempt a precise demarcation of the respective provinces of judge and jury in determining whether a zoning decision substantially advances legitimate governmental interests." *Del Monte Dunes*, 526 U.S. at 722. The Fourth Circuit zeroed in on the Court's determination to reserve that question in *Del Monte Dunes* and gave the decision an extremely narrow reading.

In the opinion of the Fourth Circuit, *Del Monte Dunes* did not establish the principle that substantially advancing a legitimate state interest is an issue of fact to be resolved by a jury. (App. 14). Rather, it established only the factual nature of whether a particular *land use decision* substantially advances a legitimate state interest. (App. 14). The court went on to forecast a trite "parade of horribles" that would be occasioned if "the federal courthouse [were opened] to a veritable flood of local land use litigation by putting every [allegation of failure to substantially advance a legitimate government purpose] before a jury." (App. 14). The remedy, according to the Fourth Circuit, is to completely ban from federal court all regulatory takings claims based on the first prong of the long recognized standard set forth in *Agins*. On its face this remedy is preposterous, but so is the prognosticated "parade of horribles."

Similar fears were voiced by the Los Angeles County and *amici* in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) where the county argued that municipalities would be unable to effectively govern if just compensation was a mandatory remedy for regulatory takings. This Court rejected the county's argument and mandated monetary compensation stating:

> We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are

> designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them. As Justice Holmes aptly noted more than 50 years ago, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

First English, 482 U.S. at 321. A similar response to the exaggerated, "flood gate" prognostications and alarmist decision of the Fourth Circuit is warranted in this case.

It is imperative for the Court to address this issue directly and either clarify the standards of the "substantially advance" test of *Agins* or overrule *Agins*, and the subsequent reliance on *Agins*, in every regulatory takings decision of this Court.

A. THE FOURTH CIRCUIT HAS COMPLETELY NEGATED THE "SUBSTANTIALLY ADVANCE" TEST FOR REGULATORY TAKINGS ESTABLISHED IN *AGINS V. CITY OF TIBURON* BY HOLDING THAT THE MERE ENUNCIATION OF A LEGITIMATE STATE INTEREST SATISFIES THE REQUIREMENT THAT THE REGULATION SUBSTANTIALLY ADVANCE THAT INTEREST

According to the reasoning of the Fourth Circuit, where a regulatory taking claim is made under the first prong of *Agins*, a standard "long recognized" (*Nollan*, 483 U.S. at 834) and referred to on "numerous occasions" (*Lucas*, 505 U.S. at 1016) as the standard for determining

whether a regulation violates the takings clause, the constitution offers only token protection because "ordinary zoning restrictions . . . quite obviously . . . substantially advance a legitimate state interest." (App. 12-13). The *Agins* test for regulatory takings is further eviscerated by the Fourth Circuit's additional finding that, "[w]hen statements by local lawmakers set out legitimate reasons for imposing height and density restrictions on property in a particular class of zones, there can be no claim in federal court that the law fails to substantially advance a legitimate purpose." (App. 14). What local lawmaking body will not from this point forward, if they haven't already, make it a routine practice to give lip service to some plausible (if not wholly pretextual) reason for enacting a regulation? The Fourth Circuit has made into law a roadmap for local governments to avoid any meaningful scrutiny of their regulations, even if motivated by bad faith, retaliatory intent or corruption, by pronouncing boiler plate language concerning the state's interest.

This Court addressed a remarkably similar situation in *Lucas* in responding to the dissent's view that even in cases where a property owner is denied all beneficial uses of his land the standard for requiring just compensation is whether a harm-preventing justification was recited by the legislature.

> Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.

Lucas, 505 U.S. at 1025 n.12.[4] The precise analysis is applicable here. By making the *de facto* standard for what constitutes "substantially advancing" a legitimate government interest wholly dependent upon the mere recitation of a legitimate reason for the regulation, the Fourth Circuit has made the first prong of *Agins* "a test of whether the legislature has a stupid staff." Certainly the *Agins* Court, and every decision of this Court that has restated the *Agins* standard, intended more than this cursory level of examination.

This Court's takings jurisprudence is replete with references to the takings analysis as dependent upon the particular facts and circumstances of the case from *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) through *Penn Central Transp. Co.*, 438 U.S. 104, 124 (1978) and *Del Monte Dunes*, 526 U.S. at 720 ("Almost from the inception of our regulatory takings doctrine, we have held that whether a regulation of property goes so far that 'there must be an exercise of eminent domain and compensation to sustain the act . . . depends upon the

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[4] In *Nollan*, this Court emphasized that the Fifth Amendment is to be respected with more than mere cursory attention paid to its requirements. "We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." (483 U.S. at 841). In *Dolan* the Court emphasized its concern by stating, "[w]e see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation. . . . " (512 U.S. at 392).

particular facts.' " (quoting *Pennsylvania Coal Co.*, 260 U.S. at 413)).[5]

"Pennsylvania Coal instructs courts to examine the operative provisions of a statute, not just its stated purpose, in assessing its true nature." *Keystone Bituminous Coal Ass'n*, 480 U.S. at 487 n.16 (upholding statute against facial taking challenge). By summarily accepting the proffered legitimate reasons for adopting a land use ordinance and presuming, because it contains height and density restriction (even where oppressive) that it "quite obviously . . . substantially advance[s] a legitimate state interest" (App. 12-13) the Fourth Circuit contradicts this Court's decision in *Pennsylvania Coal Co.* "The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power." *Pennsylvania Coal Co.*, 260 U.S. at 413. The Fourth Circuit ignores this principle by foreclosing examination of a legislature's act under the first prong of *Agins*.

The Court in *Lucas* advocated a similar probing analysis of actual circumstances rather than blind acceptance of legislative findings and declarations. To defer completely to the legislature would be misplaced and unfair because it would ignore the rights of individual citizens

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[5] *See also Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *San Diego Gas & Elec. Co.*, 450 U.S. at 649-50; *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419, 426 (1982); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 349 (1986), *Keystone Bituminous Coal Ass'n*, 480 U.S. at 474 and 495; *Hodel v. Irving*, 481 U.S. 704, 714 (1987); *Yee v. City of Escondido*, 503 U.S. at 522-23; *Lucas*, 505 U.S. at 1015; *Nollan*, 483 U.S. 825 (1987); *Dolan*, 512 U.S. 374 (1994).

in favor of the convenient prerogatives of the majority. *Lucas*, 505 U.S. at 1030-31. Prominent law and planning professors have recognized that the presumption of land use regulation constitutionality has gone too far and individual rights are indeed being abridged as a direct result. Strong, Mandelker, and Kelly, *Property Rights and Takings*, 62 J. AM. PLAN. ASS'N 5 (1996).

According to the Fourth Circuit, once a local lawmaker voices a legitimate reason for a land use ordinance the courts can never determine that the ordinance violates the Constitution pursuant to the first prong of *Agins*. In effect the determination becomes the municipality's and it thereby gets to pass constitutional judgment on its own legislation. Placing municipal regulations above the reproach of judicial review was long ago forbidden by this Court.

> If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state governor, and not the Constitution of the United States, would be the supreme law of the land; [and] that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases. . . . Under our system of government, such a conclusion is obviously untenable. . . . When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression.

Sterling v. Constantin, 287 U.S. 3778, 397-98 (1932).

The Fourth Circuit's ruling effects a categorical bar to regulatory takings claims under the "long recognized" (*Nollan*, 483 U.S. at 834) standard of *Agins*. This unmitigated deference to the stated rationale of local governments is antithetical to this Court's repeated pronouncement that regulatory takings cases "necessarily entail complex factual assessments of the purposes and economic effects of government actions." *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992). Because the Fourth Circuit's decision cannot be reconciled with the regulatory takings jurisprudence of this Court, a writ of certiorari must be granted to resolve the issue.

II. IN DISMISSING GREENSPRING'S EQUAL PROTECTION COUNTS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED THE FOURTH CIRCUIT IGNORED THIS COURT'S PRECEDENT IN *VILLAGE OF WILLOWBROOK V. OLECH*

In *Village of Willowbrook v. Olech* a property owner alleged that the actions of the local government in requesting a 33 foot easement as a condition to connecting the property to the municipal water supply was "irrational and wholly arbitrary" in light of the typical 15 foot easement requirement. 528 U.S. 562 (2000). The true motivation for the Village's disparate treatment, according to the property owner's allegations, was personal animus and ill will resulting from a previous, unrelated law suit won by the property owner against the Village. In deciding that viable equal protection claims may be brought by a "class of one", this Court also held that allegations of "irrational and wholly arbitrary" actions by

the local government "are sufficient to state a claim for relief under traditional equal protection analysis." *Olech*, 528 U.S. at 563. What distinguished this case from "the simple and common instance" of a zoning action which lacked a rational basis for the intentional disparate treatment of landowners was the allegation of an "extra factor . . . the Court of Appeals called 'vindictive action,' 'illegitimate animus,' of 'ill will.' " *Olech*, 528 U.S. at 563 (Breyer, J., concurring). This line of analysis is directly applicable to the circumstances of the instant case.

Greenspring alleged that Bill 111-98 intentionally singled out its property for irrational and wholly arbitrary disparate treatment[6] and that such treatment was motivated by "bad faith" and "retaliatory intent" (App. 82, ¶ 21; 91, ¶ 50; 97, ¶ 63). Clearly these allegations are as serious if not more serious than those set forth in *Olech*. The Fourth Circuit wholly ignored the *Olech* decision because of its illogical and unfounded conclusion that "[b]ecause the local zoning decision at issue in the instant case is not 'irrational and wholly arbitrary,' Greenspring's complaint is easily distinguished from the complaint at issue in *Olech*." (App. 17 n.4). Instead of evaluating whether Greenspring's allegations stated a sufficient claim under the Equal Protection Clause, the Fourth Circuit made a conclusory determination on the merits of the

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[6] At the heart of Greenspring's allegation of disparate treatment is Bill 111-98's restriction of BM, BL and BR zoned properties, including Greenspring's, and lack of restriction for similarly situated properties which have the same or greater potential to have harmful effects on Resource Conservation Zones. (App. 97, ¶ 63).

case and on that basis adjudged the allegations insufficient. This analysis is counterintuitive and entirely inconsistent with this Court's decision in *Olech* which decided the sufficiency of allegations not whether the governmental action at issue actually was irrational or motivated by bad faith, retaliation or corruption.

The Court should take this opportunity to define and clarify the ramifications of the *Olech* decision and overturn the Fourth Circuit's judgment as being in clear conflict with that decision.

III. GREENSPRING IS A CASUALTY OF THE CONFLICT AND CONFUSION AMONG THE CIRCUIT COURTS ABOUT HOW TO PROCEDURALLY ACHIEVE THIS COURT'S *WILLIAMSON COUNTY* REQUIREMENT THAT PROPERTY OWNERS "RIPEN" THEIR CONSTITUTIONAL CLAIMS BY SEEKING RELIEF IN STATE COURT BEFORE PURSUING AN ACTION IN FEDERAL COURT

This Court held in *Williamson County Reg. Plan. Comm'n v. Hamilton Bank* that as-applied claims for the taking of property[7] are "not ripe until the

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[7] The *Williamson County* ripeness requirement has been extended and applied to due process and equal protection. *See, e.g., Bennis v. Michigan Dept. of Nat. Res.*, 970 F.2d 154 (5th Cir. 1992); *Unity Ventures v. County of Lake*, 841 F.2d 770 (7th Cir. 1988), *cert. denied*, 488 U.S. 891 (1988); *Herrington v. County of Sonoma*, 857 F.2d 567 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989); *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227 (9th Cir. 1994); *Rocky Mountain Mat. & Asph., Inc. v. Board of County Comm'rs of El Paso County*, 972 F.2d 309 (10th Cir. 1972); *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987).

government . . . has reached a final decision regarding the application of the regulations to the property at issue" and "the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State." 473 U.S. 172, 186 and 195. Thus, litigants are required to first litigate their claims in state court before their federal action is ripe and the district court has subject matter jurisdiction. Although *Williamson County* has been precedent for nearly sixteen years, the process by which litigants satisfy its deceptively simple requirements remains a mystery.[8]

The primary obstacle to satisfying *Williamson County*'s ripeness requirement is the existence of a Catch-22 known as the "*Williamson* Trap" which works as follows:

- Following the directives of *Williamson County*, property owner first seeks, and is denied, compensation in state court;

- When property owner proceeds to federal court with now ripened federal causes of action he is confronted with the argument that the state litigation has preclusive effect on the federal action via res judicata or collateral estoppel.

This cannot be the result intended by the *Williamson County* Court.

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[8] *See, e.g.*, Meacham, *The Williamson Trap*, 32 URB. LAW. 239, 240 (2000) ("The circuits have been divided on whether there is a way to avoid the *Williamson* trap, and the Supreme Court has sent conflicting messages.")

The Courts of Appeal are manifestly confused and contradict each other in applying the *Williamson County* ripeness requirement. Some hold that once a property owner litigates in state court a federal action is *res judicata* or barred by collateral estoppel so that federal constitutional claims can never be litigated in federal district court.[9] *See, e.g., Dodd v. Hood River County,* 136 F.3d 1219 (9th Cir. 1998); *Wilkinson v. Pitkin County Bd. of Comm'rs,* 142 F.3d 1319 (10th Cir. 1998); *Rainey Bros. v. City of Memphis,* 967 F.Supp. 998 (W.D. Tenn. 1997)[10]; *Peduto v. City of North Wildwood,* 878 F.2d 725 (3d Cir. 1989). Other courts have attempted to recognize *Williamson County's* promise by adopting a procedural mechanism whereby the preclusive effects of state litigation are tempered.

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[9] This result has been criticized by legal scholars and practicing attorneys as "anomalous" and "surprising" (Roberts, RIPENESS AND FORUM SELECTION IN LAND-USE LITIGATION IN TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS (ABA, Callies, ed., 1996)), "unpleasant" (Roberts, *Fifth Amendment Takings Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata,* 24 Urb. Law. 479 (1992), and "a trap for the unwary." Meacham, *The Williamson Trap,* 32 Urb. Law. 239 (2000); Meltz, Merriam & Frank, THE TAKINGS ISSUE, Ch. 5 (Island Press 1999); Berger, *The "Ripeness" Mess in Federal Land Use Cases or How the Supreme Court Converted Federal Judges into Fruit Peddlers,* INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN Ch. 7 (1991). Indeed, the "*Williamson County* Trap" has caught even the most experienced, careful and vigilant. *See, e.g., Fields v. Sarasota-Manatee Airport Auth.,* 755 F.Supp. 377 (M. D. Fla. 1991), *aff'd,* 953 F.2d 1299 (11th Cir. 1992).

[10] Affirmed by the Sixth Circuit on June 19, 1997, in an unpublished opinion.

The Fourth and Eleventh Circuits have found that a property owner can subsequently maintain federal causes of action for adjudication in federal court if they are first "reserved" in the preceding state litigation. This is essentially an "*England* Reservation" without the requirement of first filing in federal court. *See, Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal,* 135 F.3d 275 (4th Cir. 1998); *Fields v. Sarasota-Manatee Airport Auth.,* 953 F.2d 1299 (11th Cir. 1992) (criticizing the reasoning and efficiency of the "*Jennings* Reservation" advocated in *Jennings v. Caddo Parish Sch. Bd.,* 531 F.2d 1331 (5th Cir. 1976), but nevertheless concluding that it was "too late in the day" to change the practice). The Ninth Circuit also acknowledged this reservation procedure in *Dodd v. Hood River County,* 59 F.3d 852 (9th Cir. 1995), but later repudiated it by finding that subsequent federal claims were barred by collateral estoppel. *Dodd v. Hood River County,* 136 F.3d 1219 (9th Cir. 1998). The Tenth Circuit expressed doubts as to whether a "reservation" was the proper procedural mechanism and noted that it was difficult to reconcile the *Williamson County* ripeness requirement with established *res judicata* principles. *Wilkinson v. Pitkin County Bd. of Comm'rs,* 142 F.2d at 1325, n.4.[11]

Recognizing the confusion among the Circuits and the lack of definitive guidance or affirmation from this

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[11] The lower courts' efforts have been described as "riddled with obfuscation and inconsistency," "unclear and inexact" (Meltz, Merriam & Frank, THE TAKINGS ISSUE, p. 67 (Island Press 1999)), a "judicially created quagmire" and a "Kafkaesque maze." (Kassouni, *The Ripeness Doctrine and the Judicial Regulation of Constitutionally Protected Property Rights,* 29 CAL. WEST L. REV. 1, 44, 51 (1992).

Court as to the legitimacy of any approach to the problem, in attempting to avoid the "*Williamson* Trap," Greenspring combined two precautionary steps:[12] (1) a state court action (seeking only Maryland constitutional and statutory remedies) reserving the federal claims pursuant to the instructions of the Fourth Circuit in *Front Royal*, 135 F.3d at 283 (praising the *Fields* Reservation practice and instructing *district courts* to advise takings litigants of their right to make such a reservation); and (2) a separate federal action in United States District Court (seeking only federal constitutional and legal remedies) reiterating the "Reservation" and simultaneously moving for a *stay* of "all proceedings . . . until the conclusion of the state court action" (App. 65) pursuant to the precedent of this Court in *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), and *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800 (1973).

Initially, in considering Greenspring's original removed action, the district court properly ruled "as a matter of law" that Greenspring's federal claims would be *reserved and stayed* and therefore would survive litigation in state court and be ripe for review in federal court.

> THE COURT: So, what I contemplate is that some of the federal claims will be stayed, and plaintiff

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[12] It is important to note that Greenspring took these steps after first having its original action removed from state court. Despite its stated reservation of federal claims, Baltimore County removed Greenspring's action based upon the inadvertent mention of a federal cause of action. This adds a second layer of complication to the *Williamson County* ripeness mystery; what is the appropriate treatment for a case removed to federal court.

> will be given leave to institute an action in state court in the nature of inverse condemnation, or whatever they want to call it.
>
> MR. FREILICH: And the state court claims as well.
>
> THE COURT: Whatever they are, yes. And you will proceed in state court with an express reservation so you don't run into a *res judicata* or collateral estoppel bar – well, collateral estoppel maybe, but you won't run into a *res judicata* bar. And then, when all is said and done in state court, then you will come back, and will proceed with your facial claim, your as-applied claim, and your now ripe takings claim.

(Transcript April 21, 1999 United States Dist. Ct. Hearing, pp. 64-65). But, upon filing an amended complaint, in an action directly contrary with its prior ruling, Greenspring's express Reservation and Motion to Stay, as well as the Fourth Circuit's opinion in *Front Royal*, the district court accepted, considered and granted, with prejudice, a Rule 12(b)(6) motion to dismiss Greenspring's reserved and stayed federal constitutional claims. The district court's dismissal was subsequently affirmed by the Fourth Circuit except for Greenspring's as-applied takings claim. (App. 10-11). In so affirming, the Fourth Circuit ignored its prior decision in *Front Royal* and the requested stay and severely penalized Greenspring's caution in attempting to negotiate the procedural thicket created by *Williamson County*'s ripeness requirement. Greenspring's federal complaint should not have been dismissed by the district court given the express reservation and the requested stay. Greenspring should not have been penalized for being careful and prudent in light of

the uncertainty and confusion regarding *Williamson County*.

Dismissal of Greenspring's *reserved and stayed* federal claims is a new variation on the "*Williamson* Trap" and yet another example of the legal morass created by the *Williamson County* ripeness requirement for federal takings, due process and equal protection claims. The confusion now reigning among the circuits on how to apply *Williamson County*, and particularly how to procedurally satisfy its ripeness requirement deserves this Court's immediate attention.

CONCLUSION

In light of the Fourth Circuit's evisceration of the first prong of *Agins* as a meaningful standard for regulatory takings analysis, its summary dismissal of the importance of this Court's recent decision in *Olech*, and its perpetuation of the legal morass surrounding the ripeness requirement of *Williamson County*, a writ of *certiorari* should issue to review the circuit court's decision.

Respectfully submitted,

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and

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** Mr. Lichter passed away one week prior to the filing of this petition.

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GREENSPRING RACQUET CLUB, INCORPORATED; WILLIAM HIRSHFELD; LORETTA HIRSHFELD, *Plantiffs-Appellants,* v. BALTIMORE COUNTY, MARYLAND, a body corporate and Politic *Defendant-Appellee,* and BALTIMORE COUNTY DEPARTMENT OF PERMITS AND DEVELOPMENT MANAGEMENT; ARNOLD M. JABLON, DIRECTOR, DEPARTMENT OF PERMITS AND DEVELOPMENT MANAGEMENT; BALTIMORE COUNTY COUNCIL; S.G. SAMUEL MOXLEY; KEVIN KAMENETZ; T. BRIAN MCINTIRE; VINCENT J. GARDINA; JOSEPH BARTENFELD, Baltimore County Council Members, *Defendants.*	No. 99-2444

GREENSPRING RACQUET CLUB, INCORPORATED; WILLIAM HIRSHFELD; LORETTA HIRSHFELD,

Plantiffs-Appellants,

v.

BALTIMORE COUNTY, MARYLAND, a body corporate and Politic

Defendant-Appellee,

and

BALTIMORE COUNTY DEPARTMENT OF PERMITS AND DEVELOPMENT MANAGEMENT; ARNOLD M. JABLON, DIRECTOR, DEPARTMENT OF PERMITS AND DEVELOPMENT MANAGEMENT; BALTIMORE COUNTY COUNCIL; S.G. SAMUEL MOXLEY; KEVIN KAMENETZ; T. BRIAN MCINTIRE; VINCENT J. GARDINA; JOSEPH BARTENFELD, Baltimore County Council Members,

Defendants.

No. 00-1012

Appeals from the United States District Court for the District of Maryland, at Baltimore
Andre M. Davis, District Judge.
(CA-99-469-AMD)

Argued: June 8, 2000

Decided: October 31, 2000

Before MURNAGHAN,* WILLIAMS, and MICHAEL, Circuit Judges

Affirmed in part, vacated in part, and remanded by unpublished per curiam opinion.

COUNSEL

ARGUED: Robert Henry Freilich, FREILICH, LEITNER & CARLISLE, Kansas City Missouri, for Appellants. Jeffrey Grant Cook, OFFICE OF LAW, Towson, Maryland, for Appellee. **ON BRIEF:** Virginia W. Barnhart, County Attorney, John E. Beverungen, OFFICE OF LAW, Towson, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM.

Greenspring Racquet Club, Inc., William Hirshfeld, and Loretta Hirshfeld (collectively "Greenspring") claim that application of Baltimore County Council Bill 111-98 to property located on Falls Road in Baltimore County violates their Fifth and Fourteenth Amendment rights under

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* Judge Murnaghan heard oral argument in this case but died prior to the time the decision was filed. The decision is filed by a quorum of the panel pursuant to 28 U.S.C. § 46(d).

the federal Constitution. The United States District Court for the District of Maryland granted the County's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief can be granted and shortly thereafter granted the County's motion for attorney's fees under 42 U.S.C.A. § 1988 (West 1994 & Supp.2000). This appeal followed. We affirm the dismissal under Rule 12(b)(6) of all claims but the as-applied takings claim. We hold that the as-applied takings claim is not ripe and therefore should have been dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. Because the district court's award of attorney's fees was based in part upon a finding that the unripe as-applied takings claim is frivolous, we vacate the award of attorney's fees and remand the attorney's fee issue to the district court for reconsideration in light of this opinion.

I.

William and Loretta Hirshfeld own the property at issue in this case – a 5.5 acre parcel on the east side of Falls Road in Baltimore County, Maryland – which they lease to Greenspring Racquet Club, Inc. Greenspring currently operates a tennis club on the property; however, Greenspring wants to tear down the tennis club and build one or more office buildings and a parking garage in the club's place.

To this end, Greenspring developed plans to raze the tennis club and to construct two adjoining office towers, one five stories and one six stories, with an attached parking garage. In June 1998, Greenspring submitted a

letter to the Baltimore County Development Review Committee ("DRC") requesting that Greenspring be exempt from portions of the process for public approval of the building plan pursuant to Baltimore County Code, County Development Regulations, § 26-171(b)(9). Greenspring maintains that it is legally entitled to a (b)(9) exemption because the proposed development qualifies as a "minor development" under the Code. The DRC responded to Greenspring by letter, and denied the requested (b)(9) exemption from portions of the public review process. An open hearing was held on June 22, 1998 to further consider the matter, but Greenspring's request for a (b)(9) exemption was never granted.

On June 26, 1998, Greenspring filed suit in state court seeking mandamus, declaratory, and injunctive relief from the denial of the (b)(9) exemption. Greenspring argued that it is entitled to the exemption and that denial by the DRC was unlawful.

Meanwhile, on October 5, 1998, the County Council enacted a new zoning ordinance, Bill 111-98, which imposed more restrictive limits on building improvements in areas with certain zoning designations located near rural conservation zones. Specifically, Bill 111-98 imposed a height limit of 35 feet and a floor area ratio ("FAR") of .5 in areas zoned "Business Light," "Business Major," or "Business Rural" when the exterior wall of any proposed building is within 750 feet of a rural conservation zone. The County asserts that Bill 111- 98 affects 150 sites in Baltimore County. Greenspring asserts that the new restrictions only apply to its site and one other within the county.

In January 1999, Greenspring amended its state court complaint by adding counts seeking damages and compensation under the state and federal constitutions. Greenspring reserved its federal claims, calling the action a "*Jennings-Fields* reservation." In February 1999, the County removed the case to federal court and filed a motion to dismiss.

In the meantime, Greenspring was still doing battle directly with the Baltimore County zoning authorities. After Bill 111-98 was enacted, Greenspring asked the Baltimore County Planning Board ("the Board") to rezone Greenspring's Falls Road property from a "Business Major" zone to an "Office/Residential-2" zone, in order to avoid the more restrictive limitations contained in Bill 111- 98. In March of 1999, the Board denied Greenspring's request.

In April 1999, Greenspring submitted another request to the DRC asking, again, for a (b)(9) exemption from certain public approval procedures. Along with this second request, Greenspring included a revised site plan describing construction of one eight-story office tower with a garage. The proposed building in the revised plan was confined to the same "footprint" as the pre existing improvements on the property (the tennis club), had a per-story square footage less than that of the pre-existing building, and required, according to Greenspring, no public works agreement. For these reasons, Greenspring explained to the DRC, the revised plan should be exempt from the new limitations imposed by Bill 111-98, under section 2 of that ordinance.

The DRC held an open meeting in May of 1999 to consider Greenspring's request for both a (b)(9) exemption from the public review process and a section 2 exemption from the new limits contained in Bill 111-98. The DRC denied the request for the (b)(9) exemption, again, but did not discuss the section 2 exemption.

After a hearing in the district court, Greenspring filed a Second Amended Complaint seeking declaratory, injunctive, and monetary relief under § 1983 for violations of the Fifth and Fourteenth Amendments. Greenspring included seven counts in the Second Amended Complaint, alleging state action which amounted to (1) a denial of procedural due process; (2) facial and as-applied takings; (3) facial and as-applied violations of the Equal Protection Clause; and (4) facial and as-applied violations of substantive due process. At the core of Greenspring's elaborate complaint is the contention that Bill 111-98 was adopted in bad faith, with an intent to discriminate against Greenspring, and that the Bill fails to advance a legitimate state interest.

On June 7, 1999, the County filed a Rule 12(b)(6) motion to dismiss. Greenspring opposed this motion, and urged the district court to abstain from consideration of the motion because of ripeness requirements relating specifically to the as-applied takings claim. In September 1999, the district court issued an order granting the County's motion and dismissing the case with prejudice. *See Greenspring Racquet Club v. Baltimore County*, 70 F.Supp.2d 598, 607 (D. Md. 1999).

In October of 1999, the County filed a motion seeking attorney's fees under § 1988, which the district court

awarded. *See Greenspring Racquet Club v. Baltimore County*, 77 F.Supp.2d 699, 705 (D. Md. 1999). Greenspring now appeals the order granting the 12(b)(6) motion, the district court's refusal to abstain from consideration of the 12(b)(6) motion, and the subsequent award of attorney's fees. We will consider each issue in turn.

II. *The District Court's Grant of the 12(b)(6) Motion*

This court reviews de novo a district court's order granting a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *See Baird v. Rose*, 192 F.3d 462, 467 (4th Cir. 1999). A district court should not grant a motion to dismiss under Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Moreover, all well-pleaded factual allegations are assumed to be true and are viewed in the light most favorable to the plaintiff. *See Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). We will first examine the district court's dismissal of the as-applied takings claim and then turn to the facial takings, equal protection and due process claims.

A. *As-Applied Takings Claim*

We first examine the district court's dismissal with prejudice of Greenspring's as-applied takings claim. Because Greenspring's takings claim is still pending in state court, Greenspring argues that the district court ruled prematurely on the County's Motion to Dismiss. Greenspring claims that as applied to the property on

Falls Road in Baltimore County, Bill 111-98 effects a regulatory taking without just compensation. Greenspring asserts that the application of Bill 111-98 will cause a 95.6% reduction in economically viable use of the property. This, Greenspring asserts, amounts to a taking. The district court dismissed Greenspring's as-applied takings claim, however, on the basis that Greenspring could not establish that the regulations at issue deprived Greenspring of economically viable use of the property. *See Greenspring Racquet Club v. Baltimore County*, 70 F.Supp.2d 598, 603 (D. Md. 1999).

Subject matter jurisdiction is a logical prerequisite to dismissal with prejudice under Federal Rule of Civil Procedure 12(b)(6). Whether a district court has subject matter jurisdiction is a question of law subject to de novo review. *See Anita's New Mexico Style Mexican Food, Inc. v. Anita's Mexican Foods Corp.*, 201 F.3d 314, 316 (4th Cir. 2000). In *Williamson County Reg'l Planning Comm. v. Hamilton Bank*, 473 U.S. 172 (1985), the Supreme Court established a set of ripeness requirements for Just-Compensation-Clause actions against local governments. *See id.* at 190-91. Failure to satisfy the *Williamson* ripeness requirements is fatal to the presence of federal court subject matter jurisdiction for a claim founded on the Fifth Amendment Just Compensation Clause. *See Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 (4th Cir. 1998) (discussing the *Williamson* "ripeness requirement . . . for the existence of federal court subject matter jurisdiction . . . ").

A claim alleging that a state or local governmental body has violated the Fifth Amendment Just Compensation Clause is not ripe under *Williamson* until a landowner has satisfied two requirements. First, a property owner must test the regulation's limits by exhausting available administrative exemption or variance procedures. *See Williamson County*, 473 U.S. at 186-88. Until there is a final decision as to the challenged regulation's scope, no taking occurs, and the claim is not ripe. The second ripeness prerequisite is that the governmental body actually must have denied compensation for the taking. *See id.* at 194-95. The nature of the constitutional injury in a Just-Compensation-Clause case is twofold: the government must have: (1) taken private property, (2) without just compensation. *See id.* at 195 (recognizing that "a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation . . . "). *Williamson*, therefore, requires a federal takings litigant first to litigate in state court.[1]

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[1] The Eleventh Circuit addressed the awkward posture of a plaintiff in state court who must raise his federal takings claim, or else risk having that claim precluded by the principles of res judicata in *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1303 (11th Cir. 1992). In that case, the Eleventh Circuit held that a takings litigant may "reserve" his federal claim at the time he brings the state claim required by *Williamson County Reg'l Planning Comm. v. Hamilton Bank*, 473 U.S. 172 (1985). *Id.* at 1306. The *Fields* court believed that its holding in the *Williamson* context was dictated by its predecessor circuit's holding in *Jennings v. Caddo Parish School Dist.*, 531 F.2d 1331, 1332 (5th Cir. 1976), that a reservation of federal questions pursuant to *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964), ordinarily applicable in the context of *Pullman*

Greenspring has satisfied the first of the two ripeness preconditions, but it has *not* satisfied the second. Greenspring has not yet been denied just compensation because its takings claim is still pending in state court. Thus, Greenspring's federal as-applied takings claim is not ripe. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 718 (1999) (plurality opinion of Kennedy, J.) ("Simply put, there is no constitutional or tortious injury until the landowner is denied just compensation."). Accordingly, no case or controversy presently exists, and the district court was without subject matter jurisdiction over that claim. Thus, dismissal should not have been for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), but rather should have been under Federal Rule of Civil Procedure 12(b)(1), governing the dismissal of claims for lack of subject matter jurisdiction.

As noted above, the district court dismissed all counts of Greenspring's amended complaint with prejudice under Federal Rule of Civil Procedure 12(b)(6). *See*

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abstention, may be entered even where a litigant has filed suit first in state court. Influenced by *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75, 85 n. 7 (1984), however, the *Fields* court limited *Jennings* to circumstances in which a litigant is involuntarily forced to litigate first in state court. Thus, once the state has had a chance to decide whether there was any taking of property and if so whether any compensation is due, a litigant may return for his day in federal court to resolve his federal takings claim. This Circuit indicated agreement with the *Fields* approach in *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 (4th Cir. 1998) (praising the *Fields* reservation practice as premised on "cogent analysis" and recommending that district courts advise takings litigants of their right to make such reservations).

Greenspring Racquet Club Inc. v. Baltimore County, 70 F.Supp. 2d 598, 607 (D. Md. 1999). With respect to the as-applied takings claim, the district court based its Rule 12(b)(6) dismissal on its holding that Greenspring could not establish that the regulations at issue deprived Greenspring of all economically viable use of the property. *See id.* at 604-05. Because the District Court was without subject-matter jurisdiction over the as-applied takings claim, however, it was precluded from dismissing that claim on the merits with prejudice. Greenspring may return to federal court to litigate the as-applied takings claim once Greenspring has exhausted Maryland's inverse condemnation procedures.

B. *Facial Takings Claim*

Greenspring next argues that enactment of Bill 111-98 was facially unconstitutional as a violation of the Takings Clause of the Fifth Amendment. In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Supreme Court explained that a facial takings claim raises the question of whether the mere enactment of a zoning ordinance constitutes a taking. *See id.* at 260. A general zoning law effects a taking "if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land." *Id.* (internal citations omitted).

In this case, the district court found that Greenspring could prove no facts to satisfy either element of the *Agins* test. *See Greenspring Racquet Club*, 70 F.Supp.2d at 603-05. The height and density limits contained in Bill 111-98 are ordinary zoning restrictions and, quite obviously, they

substantially advance a legitimate state interest in controlling dense development in areas located near rural conservation zones. The district court took note of statements made by Baltimore County Councilman Bryan McIntire, explaining that the restrictions in Bill 111-98 would avoid the detrimental impact on traffic, roads, sewers, and water use that can result from dense development.[2] *See id.* at 603. These rationales "clearly fall within those recognized by the courts as reasonable bases for zoning laws." *Id.* (*citing Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 828-29 (4th Cir. 1995)).

Greenspring contends that while a desire to limit traffic, water, or sewer use may be a legitimate state interest as a matter of law, whether Bill 111-98 "substantially advances" that interest is a fact question to be resolved by a jury. To support its argument, Greenspring relies heavily upon *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999). Greenspring's reading of *Del Monte Dunes*, however, is misleading. In *Del Monte Dunes*, the

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[2] Greenspring argues that consideration of the councilman's statements was inappropriate at the motion to dismiss stage, because those statements were not contained in the pleadings. We disagree. Statements made by the sponsor of legislation during a legislative debate are an important part of the legislative history of a bill. *See United States v. Newport News Shipbuilding & Dry Dock Co.*, 837 F.2d 162, 167 (4th Cir. 1988). Moreover, at the 12(b)(6) stage "the legislative history of an ordinance is not a matter beyond the pleadings" because matters of public record may properly be taken into account. *See Anheuser-Busch v. Schmoke*, 63 F.3d 1305, 1311 (4th Cir. 1995), *vacated on other grounds*, 517 U.S. 1206, 116 S.Ct. 1821, 134 L.Ed.2d 927 (1996); 5A Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure § 1357 (1990).

jury was asked to decide whether a particular decision to deny a building permit "substantially advanced" a legitimate state interest. *See id.* at 700. Whether the local zoning laws themselves advanced a legitimate state interest was not the question before the jury. In fact, the Court said that where a plaintiff brings a broad challenge to the constitutionality of the city's zoning ordinances themselves (rather than challenging a particular decision made pursuant to those ordinances), "the determination whether the statutory purposes were legitimate, or whether the purposes, though legitimate, were furthered by the law or general policy, might well fall within the province of the judge." *Id.* at 722.

Greenspring's suggestion, moreover, does not make any logical sense. If the question of whether a zoning ordinance substantially advances a legitimate state interest is always a triable issue of fact for a jury, then every challenge to any zoning regulation would warrant a jury trial in federal court. We cannot accept such a remarkable proposition and decline Greenspring's invitation to open the federal courthouse to a veritable flood of local land use litigation by putting every such allegation before a jury. When statements by local lawmakers set out legitimate reasons for imposing height and density restrictions on property in a particular class of zones, there can be no claim in federal court that the law fails to substantially advance a legitimate purpose.

The second prong of the *Agins* rule requires a plaintiff to show that the mere enactment of a zoning ordinance "denies an owner economically viable use of his land." 447 U.S. at 260. Because Greenspring currently operates a viable tennis club on the property at issue, and

the enactment of Bill 111-98 will not prohibit Greenspring from continuing to do so, the district court found that Greenspring could prove no set of facts to establish that Bill 111-98 denies Greenspring economically viable use of the land. Greenspring objects to the district court looking beyond the pleadings, but the fact of the tennis club's current operation is acknowledged in the pleadings.[3] Greenspring asks this court to ignore reality and find that it conceivably could prove that the mere enactment of the zoning ordinance denies them all viable economic use of the property. We conclude that there is no way for Greenspring to prove such a claim, considering the currently operational tennis club and the possibility of building something new on the property within the limits imposed by Bill 111-98.

The district court correctly found that Greenspring could prove no set of facts to sustain a facial takings claim regarding Bill 111-98. Thus, the motion to dismiss was properly granted as to the facial takings claim.

C. *Equal Protection Claims*

Greenspring's equal protection claims are based on the assertion that Bill 111-98 was passed in bad faith with discriminatory intent. These allegations, however, are not sufficient to state an equal protection claim because the law at issue easily passes rational basis scrutiny.

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[3] See Second Amended Complaint, ¶ 12 (stating that "there is adequate infrastructure and capacity . . . which are currently being used by the existing athletic/racquet club to accommodate the proposed development.").

When "government action [does] not burden a fundamental right or employ a suspect classification, the pertinent question for determining whether the governmental action violated the Equal Protection Clause is whether the . . . officials reasonably could have believed that the action was rationally related to a legitimate governmental interest." *Front Royal & Warren County Industrial Park Corp. v. Town of Front Royal*, 135 F.3d 275, 290 (4th Cir. 1998).

Greenspring does not allege that Bill 111-98 utilizes a suspect classification or burdens a fundamental right. Rational basis review is therefore the proper standard for evaluating this claim. Greenspring contends, however, that even under rational basis review, the enactment of Bill 111-98 must be struck as constitutionally invalid. Greenspring alleges that the ordinance was enacted by local authorities with malicious, bad-faith, discriminatory intent, which, of course, is not related to any legitimate state purpose. These allegations, according to Greenspring, are enough to survive the motion to dismiss. We disagree.

The facial equal protection challenge to the law must fail because on its face Bill 111-98 applies to all property within the delineated zones – it is a generally applicable law, and all similarly situated persons are treated alike. The as-applied equal protection challenge also must fail, because there is an obvious, legitimate basis for the Bill's enactment: restricting dense growth in areas located near rural conservation zones. While Greenspring is free to speculate about the hostility that local officials directed toward them, in order to state an equal protection claim Greenspring also must demonstrate that there is no other

legitimate purpose for the law. In other words, Greenspring must allege that malice and bad faith were the *only conceivable* bases for enacting Bill 111-98, and this they cannot do. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) (stating that "[t]hose attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.' ") (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). Where an obvious, legitimate purpose is evident on the face of a challenged law, an equal protection claim under rational basis review must fail.[4] Thus, we conclude that both the facial and as-applied equal protection claims properly were dismissed.

D. *Due Process Claims*

Finally, Greenspring argues that the enactment and application of Bill 111-98 deprives it of both substantive and procedural due process. The procedural due process claim easily is dismissed, because administrative and

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[4] This fundamental tenet of equal protection jurisprudence is not changed by the Supreme Court's recent decision in *Village of Willowbrook v. Olech*, 120 S.Ct. 1073 (2000). In *Olech*, local zoning authorities demanded a 33-foot easement as a condition of connecting plaintiff's property to the municipal water supply although only a 15-foot easement was required from other similarly situated property owners. The Court held that the complaint, which alleged that the local zoning decision was "irrational and wholly arbitrary," was sufficient to state a claim for relief under traditional equal protection analysis. Because the local zoning decision at issue in the instant case is not "irrational and wholly arbitrary," Greenspring's complaint is easily distinguished from the complaint at issue in *Olech*.

judicial appeals from all Baltimore County zoning decisions are readily, if not speedily, available. The mere fact that post-deprivation remedies may take some time to pursue does not render them constitutionally infirm. *See Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 817, 827 (4th Cir. 1995).

The substantive due process claim is based specifically upon Greenspring's allegation that Bill 111-98 is arbitrary and capricious and, therefore, not related to any legitimate governmental interest. Greenspring fails to address, however, the threshold inquiry in any due process claim: In order to state a viable due process claim, Greenspring must do more than attack the quality of the legislative process in Baltimore County; Greenspring must identify a constitutionally protected property interest upon which Bill 111-98 infringes.[5] If no protected property interest exists, there is no need to consider whether any alleged deprivation of that interest was effected with "due process." *See Scott v. Greenville County*,

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[5] Greenspring argued below, and on appeal, that it has a constitutionally protected property interest in a (b)(9) exemption from portions of the public review process usually required as a prerequisite to issuance of a building permit. We note, however, that the parties have since agreed that Greenspring's application to amend the site plan must be subject to the approval regulations in effect in 1975, the year that the original site plan was approved. *See Greenspring Racquet Club v. Baltimore County*, No. 99-4790, slip op. at 1 (Cir. Ct. Baltimore County, May 16, 2000). The disagreement over whether Greenspring legally is entitled to the (b)(9) exemption is therefore moot, and we will accordingly restrict our discussion of the due process claim to the enactment and application of Bill 111-98.

716 F.2d 1409, 1418 (4th Cir. 1983) (stating that "[t]he starting point for our [due process] inquiry is to determine whether state or local law afforded Scott a 'protectible property interest in the permit' sufficient to trigger federal due process guarantees").

A constitutionally protected property interest must be "more than an abstract need or desire. . . . [and] more than a unilateral expectation" and instead must be something to which one has a "legitimate claim of entitlement." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Greenspring has no legal entitlement to develop the Falls Road property with buildings in excess of 35 feet in height and .5 FAR. Greenspring certainly had such an *expectation*, but because Greenspring had no legally vested *right* to develop the property in this way, it cannot claim a constitutionally protected property interest in doing so. Because Greenspring has no constitutionally protected property interest in development of the property outside the bounds of Bill 111-98, Greenspring does not state a viable substantive due process claim. We therefore conclude that the claim properly was dismissed.

In summary, the district court properly dismissed Greenspring's due process, equal protection, and facial takings claims under Rule 12(b)(6).

III. *The District Court's Refusal to Abstain from Consideration of the 12(b)(6) Motion*

Greenspring argues that the district court should have abstained from ruling on each of its claims. We review the district court's decision not to abstain from

hearing a case for abuse of discretion. *See Pomponio v. Fauquier County*, 21 F.3d 1319, 1324 (4th Cir. 1994).

The abstention issue is relevant only to Greenspring's as-applied takings claim and is based upon the ripeness requirements set forth in *Williamson County Reg'l Planning Comm. v. Hamilton Bank*, 473 U.S. 172 (1985). *Williamson*, however, is not an abstention doctrine but a jurisdictional rule calling for dismissal simply because the federal courts do not possess subject matter jursidiction over a takings claim until *Williamson*'s requirements have been met. *See Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 (4th Cir. 1998) (indicating that subject matter jurisdiction is lacking when *Williamson*'s ripeness requirements have not been met). Thus, while the difference may appear merely formal, the district court's error was not in refusing to abstain, but, rather, in reaching the merits of a claim over which it possessed no jurisdiction.

IV. *The Award of Attorney's Fees*

Finally, Greenspring asserts that the district court erred in awarding attorney's fees to the County. This court reviews an attorney's fee award for abuse of discretion. *Hitachi Credit America Corp. v. Signet Bank*, 166 F.3d 614, 631 (4th Cir. 1999). By definition, a district court abuses its discretion when it makes an error of law. *See Brodziak v. Runyon*, 145 F.3d 194, 196 (4th Cir. 1998). Section 1988(b) provides that "[i]n any action or proceeding to enforce a provision of section . . . 1983 . . . the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs." 42 U.S.C.A.

§ 1988(b) (West 2000). Fee motions must be filed within fourteen days of judgment pursuant to District of Maryland Local Rule 109.2, and failure to timely file a fee request can justify the court of appeals in vacating a district court's award of attorney's fees. *See Ortega v. Geelhaar*, 914 F.2d 495, 498 (4th Cir. 1990). An applicant must present properly authenticated and accurate documentation for an attorney's fee request. *See Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1983).

An award of attorney's fees to a defendant in a § 1983 suit only may be made where a plaintiff's claims are " 'frivolous, unreasonable or without foundation, even though not brought in subjective bad faith.' " *Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (*quoting Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)).

The district court found that Greenspring's claims were "wholly without foundation." *Greenspring Racquet Club Inc. v. Baltimore County*, 77 F.Supp.2d 699, 703 (D.Md.1999). The due process and equal protection claims were deficient under obvious and well established legal principles. As the entire preceding analysis indicates, the district court's conclusion that Greenspring's due process, equal protection and facial takings claims were "frivolous and unreasonable" is amply supported by the record and well within the district court's appropriate exercise of discretion. The district court's award of attorney's fees also clearly rested upon a finding that the unripe as-applied takings claim was entirely frivolous. We have held, however, in Section II.A that a district court may not make such a determination with respect to an unripe claim, because such a determination would

finally dispose of the merits of a claim over which the district court did not possess subject matter jurisdiction.

The First Circuit has held that where a plaintiff brings interrelated claims, some of which are frivolous and some of which are not frivolous, a district court may award fees to the defendant under § 1988 for the costs of defending the frivolous claims. *See Ward v. Hickey*, 996 F.2d 448, 455 (1st Cir. 1993). The First Circuit has indicated that the District Court should calculate a fee amount in light of the fact that only some of the claims at issue were found to be frivolous. *See id.* (stating that "a district court should not deny fees for defending frivolous claims merely because calculation would be difficult" and thus implying that calculation of an appropriate fee amount could not include fees attributable to the non-frivolous claims). The Sixth Circuit has held that a district court does not abuse its discretion by entirely denying a defendant's request for attorney's fees under § 1988 on the basis that some of the plaintiff's claims were meritorious even though others may have been frivolous. *See Wayne v. Village of Sebring*, 36 F.3d 517, 530 (6th Cir. 1994). No circuit, however, has held that a district court may award attorney's fees for the costs of defending non-frivolous portions of a § 1983 suit. Our holding in Section II.A necessarily means that at this stage in the litigation, the district court may not definitively determine that Greenspring's unripe as-applied takings claims are frivolous. Thus, the impossibility of making a determination of frivolity as to the unripe as-applied claims makes it necessary for us to vacate the District Court's award of attorney's fees and remand this issue for reconsideration

in light of this opinion.[6] On remand, the District Court may wish to recalculate the fee amount, excluding any amount attributable to the unripe as-applied takings claim, or it may wish instead to entirely defer consideration of the attorney's fees issue until such time as the as-applied takings claim becomes ripe.

V.

For the foregoing reasons, the orders entered by the district court are affirmed except insofar as they dismiss Greenspring' as-applied takings claim and insofar as they award attorney's fees to the County under § 1988. The order dismissing the as-applied takings claim is vacated and the case is remanded with instructions to dismiss

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[6] Greenspring also lodges two specific complaints regarding the fee award. We address these issues because they "surely would be raised again on remand with attendant delays of hearing and appeal." *South Carolina ex rel. Tindal v. Block*, 717 F.2d 874, 887 (4th Cir. 1983). First, Greenspring argues that the motion for fees was not timely. This issue will arise on remand if the District Court decides to recalculate the fee award based upon the initial application. Federal Rule of Civil Procedure 6(b)(2) grants the trial judge discretion to accept a fee motion beyond the prescribed time limits. The district court's decision to do so in this case was entirely reasonable. Second, Greenspring challenges the time records submitted by the County. Admittedly, the records are not entirely regular; they are hand written, for example. However, the district court found that the records comply with the requirements outlined in the local court rules and accurately reflect the time spent by defendant's counsel. We find that the district court's resolution of this issue was within "the district court's broad discretion" in calculating an attorney's fee award. *Daly v. Hill*, 790 F.2d 1071, 1085 (4th Cir. 1986).

that claim without prejudice under Fed.R.Civ.P. 12(b)(1) on the ground that the district court lacks subject-matter jurisdiction. The order awarding attorney's fees is vacated and the issue of attorney's fees is remanded for reconsideration in light of this opinion.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GREENSPRING RACQUET CLUB, INC., et al., Plaintiffs	:	Civil No. AMD 99-231
v.	:	
BALTIMORE COUNTY, MARYLAND, et al., Defendants	:	
GREENSPRING RACQUET CLUB, INC., et al., Plaintiffs	:	Civil No. AMD 99-469
v.	:	
BALTIMORE COUNTY MARYLAND, et al., Defendants	:	

ORDER

These cases came before the Court for a hearing on the pending motions on April 21, 1999. Counsel having been heard, and the Court having rendered its rulings on the record, it is this 22nd day of April, 1999, ORDERED

(1) That the motion to dismiss filed in case no. AMD 99-231 (Paper # 4) is GRANTED; and it is further ORDERED

(2) That the motion to dismiss filed in case AMD 99-469 (Paper # 8) is GRANTED, AND PLAINTIFFS ARE GRANTED LEAVE TO FILE AN AMENDED COMPLAINT ON OR BEFORE MAY 15, 1999, and to seek a

stay pending exhaustion of all state law claims; and it is further ORDERED

(3) That the motions to remand in case no AMD 99-469 (Paper # 11), to consolidate (AMD 99-231 Paper #5; AMD 99-469 Paper #9) and for leave to file a response (AMD 99-231 Paper #14; AMD 99-469 Paper #16) are DENIED AS MOOT; and it is further ORDERED

(4) That The Clerk shall CLOSE CASE NO AMD 99-231 and TRANSMIT a copy of this Order to all counsel.

/s/ Andre M. Davis
ANDRE M. DAVIS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GREENSPRING RACQUET CLUB, INC., et al.,	:	
Plaintiffs	:	Civil No. AMD 99-469
v.	:	
BALTIMORE COUNTY, MARYLAND	:	
Defendant	:	

MEMORANDUM

(Filed Sept. 27, 1999)

This is a poorly disguised zoning case masquerading as a collection of constitutional claims. Plaintiffs, Greenspring Racquet Club, Inc., William Hirshfeld, and Loretta Hirshfeld (collectively "Greenspring"), own the property which is the subject of this litigation: a parcel consisting of approximately 5.5 acres located on the east side of Falls Road, north of Joppa Road in Baltimore County, Maryland. Plaintiffs currently operate a tennis club on the property but they would rather raze the tennis club and construct one or more office buildings and a parking garage.

Plaintiffs have filed a seven count second amended complaint seeking equitable relief and damages in respect to the County's application to their property of County Council Bill No. 111-98 ("the Ordinance"). To date, the County has not approved Greenspring's site plans, thus delaying construction; a prolonged challenge in state

court is in the offing, with the effect, perhaps, of permanently depriving Greenspring of the opportunity to redevelop its property in an economically advantageous environment. Pending before the court is the County's Motion to Dismiss. The issues have been fully briefed and no hearing is necessary. For the reasons stated below, I shall grant the County's motion.[1]

(i)

A complaint should not be dismissed for failure to state a claim under Fed.R.Civ.P. 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *accord Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Motions to dismiss for failure to state a claim are "granted sparingly and with caution in order to make certain that plaintiff is not improperly denied a right to have his claim adjudicated on the merits." 5A Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE, CIVIL 2D § 1349 at 192-93 (1990).

Rule 8(a)(2) requires only that a complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a). A claimant is not required to "set out in detail the facts upon which he bases his claim" so long as the claim "will give the

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[1] Greenspring's Motion to Strike Impertinent and Scandalous Material, its Motion to Stay and the County's Motion to Strike are denied as moot.

defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 47. Moreover, all well-pleaded factual allegations are assumed to be true and are viewed in the light most favorable to the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969). Only when the factual allegations in support of a claim are not well-pleaded (e.g., when they are "functionally illegible" or "baldly conclusory," *Shuster v. Oppelman*, 962 F.Supp. 394, 395 (S.D.N.Y.1997)), should they not be accepted as true and the claim dismissed.

Application of the above principles to the instant case compels the conclusion that the motion should be granted.

(ii)

Accepting Greenspring's account of the facts as true, the following constitutes the course of events leading to this litigation. Greenspring developed plans to raze the tennis club currently occupying its site and to construct two adjoining office towers, one five stories and one six stories, with a structured parking garage. On June 10, 1998, Greenspring submitted a letter to the County Development Review Committee ("CDR"), requesting that it be exempted from portions of the process for plan approval delineated in Division 2 of the County Development Regulations. Balt. County Code §§ 26- 201 to 26-217.[2] In this

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[2] These portions consisted of Community Input Meetings, Hearing Officer Review and *de novo* appeal to the Baltimore County Board of Appeals.

letter, Greenspring explained that it was entitled to be exempted from this process pursuant to Baltimore County Code § 26-171(b)(9) because its proposed development qualified as a "minor development" under the Code. Attached to this letter request was a site plan for the proposed demolition and construction. The DRC indicated by letter dated June 17, 1998, that it would not allow the requested exemption from portions of the review process, and it held an open meeting on June 22, 1998, to further consider Greenspring's request. Greenspring's request was never granted.

Meanwhile, on October 5, 1998, the County Council enacted the Ordinance, which imposes a height limit of 35 feet and a floor area ratio limit ("FAR") of 0.5 for certain new construction on Greenspring's site and one other site in Baltimore County.[3] Greenspring promptly requested that the Baltimore County Planning Board rezone its property from a "Business Major" zone to an "Office/ Residential-2" zone. This request was denied on March 18, 1999.

On April 27, 1999, Greenspring submitted a second request to the DRC asking again that it be exempted from

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[3] The Ordinance does not specify Greenspring's site but limits the maximum building height to 35 feet and the FAR to 0.5 of any proposed building in zones classified as "Business Light," "Business Major," or "Business Rural," when "the exterior wall of any proposed building . . . is within 750 feet of [a Rural Conservation] Zone." Balt. County Council Bill No. 111-98. Greenspring claims these restrictions cover only its site and one other. The County asserts that the Ordinance affects 150 sites. County's Motion to Dismiss at 9. For the purposes of the motion, I assume that Greenspring's allegations are true.

the specified procedural requirements of Division 2. In addition, Greenspring attached a revised site plan describing construction of one eight story office tower with garage, and it requested that it be exempted from the limitations of the Ordinance. According to Greenspring, this letter explained that under Section 2 of the Ordinance, the revised development plan qualified for exemption from the height and floor ratio requirements because the new construction is confined to the same footprint as the preexisting improvements on the site, the square footage per story of the proposed building is less than the preexisting one, and no public works agreement is required.

The DRC held an open meeting to consider Greenspring's request for exemptions from both portions of the review process and the height/floor area ratio restrictions of the Ordinance. It denied the request for exemption from the review process, indicating that Greenspring should speak with Arnold Jablon, the Director of Permits and Development Management, who could direct the DRC to later approve the request. The request for exemption from the height and floor area ratio requirements of the Ordinance was not discussed. *See* County's Motion to Strike, Ex. 1 (Transcript of the Meeting of the DRC on May 10, 1999).

(iii)

The amended complaint contains seven counts: two claims alleging unconstitutional takings without just compensation (one facial, one as applied); two claims alleging equal protection violations (one facial, one as

applied); one claim alleging a violation of procedural due process; and two claims alleging substantive due process violations (one facial, one as applied). I shall address these in turn.

Takings Claims

Greenspring alleges that the County has effectively taken its property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.[4] The facial and most of the variations of the "as applied" takings claims fail, among other reasons, because Greenspring does not have any constitutionally protected property interest that was affected by the County's enactment and application of the zoning laws and regulations at issue. Furthermore, while I shall assume, for the purposes of the pending motion, that Greenspring does have a constitutionally protected property interest insofar as it claims an entitlement to a non-discretionary exemption from the Ordinance (as provided in Section 2 thereof), this "as applied" claim also fails because Greenspring does not sufficiently allege that it has been deprived of substantially all of the economic value of its property in consequence of its failure to obtain the desired exemption.

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[4] The Fifth Amendment provides "nor shall private property be taken for public use, without just compensation," and applies to the states through the Fourteenth Amendment. U.S. Const. Amends. 5, 14; *see First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 310 n.4 (1987).

Facial Taking

Greenspring contends that the enactment of the height and floor area ratio restrictions of the Ordinance on their face effectively deprived it of "all or substantially all of the economic use and/or value" of its property.[5] Second Amended Complaint at ¶¶ 45, 47, and 60. However, Greenspring has no constitutionally protected property right in the airspace or anything else which was affected by the Ordinance, so it fails to state a claim that the County took something from it by enacting the Ordinance.

Since 1909, the Supreme Court has upheld height restrictions on buildings which a state or local legislative body reasonably concluded promoted "the health, safety, morals, or general welfare." *Welch v. Swasey*, 214 U.S. 91 (1909). Even in the absence of height restrictions, the Supreme Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 130 (1978), made it clear that no "taking" is established "simply by showing that [plaintiffs] have been denied the ability to exploit a property interest [in air space] that they heretofore had believed was available for development. . . ."[6] As in *Penn Central*,

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[5] Greenspring also asserts that the Ordinance on its face "took title" to the airspace above its property and thus effected a taking. However, this claim fails because Greenspring does not allege that the County repossessed its title to the property or encumbered it in any way. A takings claim cannot rest upon a "symbolic taking" of a title.

[6] Greenspring asserts a "vested property right" in the development it would have been able to achieve under the

Greenspring continues to be able to use its building as it has in the past, and the Ordinance does not prohibit all air development, just development higher than 35 feet.

Moreover, the rationales cited by the County to support its enactment of the Ordinance clearly fall within those recognized by the courts as reasonable bases for zoning laws. *See Sylvia Dev. Corp. v. Calvert County,* 48 F.3d 810, 828-29 (4th Cir. 1995) (holding that proper bases for zoning determinations include concern about further growth in rural areas, residential density, community aesthetics, traffic congestion, and water supplies). In urging passage of the Ordinance, County Councilman T. Bryan McIntire explained that the height and floor area ratio restrictions would have esthetic benefits, would decrease transportation congestion, improve flood management, and conserve water and sewer resources. Motion to Dismiss at 11 (*quoting* Councilman McIntire). Thus, the Ordinance represents a valid exercise of the County's authority to protect the health and welfare of its residents, and its enactment was without a cognizable effect – constitutionally speaking – upon the protected property interests enjoyed or owned by Greenspring.

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zoning law applicable to its property prior to the enactment of the Ordinance. However, it is well settled in Maryland that such a right does not vest unless the property owner had acquired a building permit under the old law and had commenced construction. *Prince George's County v. Sunrise,* 330 Md. 297, 623 A.2d 1296 (1993); *Richmond Corp. v. Prince George's County,* 254 Md. 244, 255 A.2d 398 (1969). Greenspring never acquired a permit under the old law and had not commenced demolition and construction.

As Applied Taking

Greenspring asserts that three actions (or, more correctly, refusals to act) by County officials constitute unconstitutional takings: (1) the County's refusal to reclassify Greenspring's property so as to exclude it from the Ordinance; (2) the County's refusal to exempt Greenspring's plans from the public meeting and hearing officer review process specified in Division 2 of the County's development regulations; and (3) the County's refusal to exempt Greenspring's amended site plan from the Ordinance pursuant to Section 2 thereof.[7] It is plain, however, that neither singly nor in combination do these contentions state a claim under the Fifth and Fourteenth Amendments.

The first two of these claims, like the facial claim discussed above, fail to state a claim because Greenspring lacked a constitutionally protected property interest that

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[7] This third claim is clearly not ripe for decision because, despite Greenspring's claim that its request for a Section 2 exemption "was denied on May 10, 1999 by the DRC," Second Amended Complaint at ¶ 58, the transcript of that meeting reveals that the request for Section 2 exemption was not even discussed at that meeting, let alone denied. Motion to Strike, Ex. 1 (Transcript of the Meeting of the Development Review Committee on May 10, 1999). In any event, Greenspring is pursuing an administrative appeal of the DRC's decisions and of the County's refusal to reclassify its property's zoning designation. Nevertheless, I discuss the alleged Section 2 exemption denial here because if Greenspring indeed has a viable federal claim, I would need to consider whether to grant a stay and whether abstention would be appropriate.

the County's actions affected. The third fails to state a claim because Greenspring has failed to allege sufficiently – and is unable so to allege – that it was deprived substantially of all the economic value of its property.

The first two as applied claims will be dismissed for lack of a cognizable affected property interest. As the Supreme Court held in *Board of Regents v. Roth*, 408 U.S. 564 (1972), to have a property interest, "a person must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate entitlement to it." *Id.* at 577. The Fourth Circuit takes the position, predominant in the circuits which have considered the issue, that such an entitlement is created when, "under state or municipal law, the local agency lacks all discretion to deny issuance of the permit or to withhold its approval. Any significant discretion conferred upon the local agency defeats the claim of a property interest." *Gardner v. City of Baltimore*, 969 F.2d 63, 68 (4th Cir. 1992) (collecting cases); *accord Front Royal v. Town of Front Royal*, 135 F.3d 275, 288 (4th Cir. 1998); *Love v. Pepersack*, 47 F.3d 120, 122 (4th Cir.), *cert. denied*, 516 U.S. 813 (1995); *Biser v. Town of Bel Air*, 991 F.2d 100, 104 (4th Cir.), *cert. denied*, 510 U.S. 864 (1993).

Clearly, the County exercises discretion when it considers requests to reclassify the zoning of property. *See* Balt. County Code § 2-356.[8] Greenspring's hope that the

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[8] While the Board of Appeals must make certain findings before reclassification is permitted, those findings are based upon its exercise of discretion. The County Code specifies that in deciding whether "[t]he prospective reclassification is warranted by [the change in the neighborhood,]" the Board

County would reclassify its site from "Business Major" to "Office/Residential 2" is a mere unilateral expectation and not an entitlement. Similarly, the County's refusal to waive portions of the Division 2 process did not affect a constitutionally protected property interest. I assume for the purposes of the motion that Greenspring qualified for a waiver under Baltimore County Code § 26-171(b)(9). Even if the grant of such a waiver is arguably nondiscretionary when an applicant qualifies, however, the waiver would not have resulted in a nondiscretionary approval of Greenspring's plans to build. Greenspring would still have had to submit a development plan pursuant to § 26-203, undergo preliminary review by the department of public works pursuant to § 26-204, and then undergo review by over thirteen County agencies pursuant to § 26-205, before getting consideration by the planning board for final approval. *See id.* at § 26-208. Discretion is exercised by the County at each of these stages; accordingly, Greenspring has no constitutionally protected entitlement of which it has been deprived and for which it might seek a remedy in federal court.

Analysis of the third as applied taking claim is slightly different but the outcome is the same. At this stage of the proceedings, I assume that Greenspring has a property interest in obtaining a Section 2 exemption from

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must consider a host of factors, including population trends, adequacy of transportation, water, sewerage and solid waste disposal facilities, and the proposed project's impact on water quality and fish, wildlife and plant habitats. Balt. County Code § 2-356(j).

the height and floor ratio requirements of the Ordinance[9] because the grant of such an exemption is nondiscretionary provided Greenspring demonstrates it has fulfilled the exemption's prerequisites as spelled out in the Ordinance. I further assume the truth of Greenspring's allegation that it demonstrated to the County that its amended plan fulfilled the Section 2 requirements and that it is, therefore, entitled to the exemption. I further assume that the exemption would have resulted in a nondiscretionary approval of its amended site plan to build the one eight story office building and garage. Nevertheless, despite its property interest in obtaining approval for the amended site plan, Greenspring fails to state a claim because it fails to allege a key element of a takings claim: that it was deprived "of substantially all economic value" of its property.

The Supreme Court recently reiterated this well established element of a takings claim in *Dolan v. City of Tigard*, 512 U.S. 374 (1996). "A land use regulation does not effect a taking if it 'substantially advances legitimate state interests' and does not 'deny an owner economically viable use of his land.' " *Id.* at 384-85 (citations omitted). As the Fourth Circuit explained in *Front Royal*, "[n]ot all

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[9] The Ordinance provides in relevant part: "Section 2. And be it further enacted that this Act shall not apply to . . . the redevelopment of an improvement existing on October 5, 1998, if (1) the improvement occurs within the same footprint, (2) the square footage, per story, of the existing improvement and (3) a public works agreement is not required, in the opinion of the Directors of Public Works, Permits and Development Management, and Environmental Protection and Resource Management."

regulatory deprivations amount to regulatory takings, and a regulatory deprivation that causes land to have 'less value' does not necessarily make it 'valueless.' " 135 F.3d at 286. This principle is controlling in the case at bar.

While Greenspring's complaint recites that it has been deprived of "all economic benefit of [its] property," this is merely a conclusory assertion at odds with facts which are subject to judicial notice; indeed, Greenspring does not (because it cannot) contradict the County's assertion that it currently operates an economically viable tennis club at the site. In any event, Greenspring has two obvious economic uses for its property: it could continue operating the tennis club, or it could raze the club and build an office building not exceeding 35 feet in height or 0.5 floor area ratio.[10] Thus, I conclude that Greenspring's assertion that it has been deprived of "all or substantially all of the economic use" of its property is "baldly conclusory" and insufficient to withstand a motion to dismiss.[11]

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[10] As to the facial takings claim, Greenspring's own complaint suggests a third possibility. While the Ordinance apparently precludes it from building the two office buildings (one five stories, one six stories) and garage envisioned in its first site plan, its complaint asserts that it is entitled *on the face* of Section 2 of the Ordinance to build an eight story office building with garage in the footprint of the current improvements.

[11] Despite the fact that the denial of a Section 2 exemption would constitute a quasi judicial act, the more relaxed standard enunciated in *Dolan* does not govern the determination of whether Greenspring has been deprived of the economic use of its property. *See* 512 U.S. at 384-85 (holding that the city effectuated unconstitutional taking by prohibiting plaintiff from doubling the size of her retail store unless she deeded over a

Equal Protection Claims

Greenspring alleges both facial and as applied claims that the County has deprived it of equal protection of the laws in the County's enactment of height and floor area ratio restrictions, and in the County's application of these restrictions to its property. These purported claims fail as a matter of law because even if one assumes that the Ordinance affects only two properties in the entire County, Greenspring alleges no basis upon which a fact finder could find a denial of equal protection.

"[E]qual protection is not a license for courts to judge the wisdom, fairness or logic of legislative choices." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). When "government action [does] not burden a fundamental right or employ a suspect classification the pertinent question for determining whether the governmental action violated the Equal Protection Clause is whether the . . . officials reasonably could have believed that the action was rationally related to a legitimate governmental

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portion of her property to it.). The Supreme Court held that the requirement that the owner deed over part of her property was critical to the application of a relaxed standard. *Id.* By contrast, Greenspring will not be required to deed any portion of its property to the County.

Greenspring also claims that the County effectuated a "taking" in requiring it to pursue unconstitutionally burdensome procedures for administrative and judicial relief from a wrongful zoning decision. Second Amended Complaint at ¶ 58. This claim fails because, as I explain in text, the delay which Greenspring speculates will occur in the appeals process does not render that process unconstitutional. *See infra* at 15.

interest." *Front Royal*, 135 F.3d at 290. The legislators' actual motivation is irrelevant. *Id.; accord United States v. O'Brien*, 391 U.S. 367, 383-84 (1968). As the Supreme Court held in *Beach Communications, Inc.*:

> [T]hose attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it. Moreover because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.

508 U.S. at 315 (internal quotations and citations omitted); *accord Front Royal*, 135 F.3d at 290.

Furthermore, the mere fact that one is treated differently than someone who is similarly situated is not sufficient to run afoul of the equal protection clause. As the Fourth Circuit explained:

> If disparate treatment alone were sufficient to warrant a constitutional remedy, then every blunder by a local authority, in which the authority erroneously or mistakenly treats an individual differently than it treats another who is similarly situated, would rise to the level of a federal constitutional claim.

Sylvia Dev. Corp., 48 F.3d at 825.

Greenspring does not allege that any fundamental right was adversely affected by the County's actions. Moreover, it does not allege any invidious discrimination based upon suspect categories (i.e., race, ethnicity, national origin, religion or sex). Thus, rational basis

review applies. Greenspring alleges merely that the Ordinance, on its face and as applied to it, singles out its property and one other for adverse treatment while other "similarly situated" (but differently zoned) properties were unaffected by the height and floor area ratio requirements. Greenspring contends further that construction on those similarly situated properties could also have an effect on the rural zones the Ordinance seeks to protect.

These arguments are unavailing. While it is patently clear that differently zoned properties are not similarly situated as to zoning, these arguments also fail because Greenspring does not allege an invidious purpose. Government is not consigned to inactivity because it cannot legislate comprehensively in one step. The fact of disparate treatment, in the absence of invidious discrimination, does not invoke a more stringent standard of review. As a matter of law, the Ordinance is rationally supported by legitimate objects of the County in its regulation of land use within its borders. No more searching standard of review is required or justified.

Procedural Due Process Claim

Greenspring contends that the County's procedures for administrative and judicial relief from a wrongful zoning decision are unconstitutional.[12] The gravamen of

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[12] Because a successful due process claim depends upon the existence of a cognizable property right, *Sylvia Dev. Corp.*, 48 F.3d at 826-7, Greenspring's due process claim fails as to the passage of the Ordinance, the failure to reclassify the zoning

this claim is Greenspring's allegation that because it might take "in excess of two years" to pursue administrative and judicial appeals, these procedures are unconstitutionally burdensome. However, Greenspring does not explain how it arrived at this two year projection, and in any event, delays of this magnitude are not unconstitutional burdens. Even when a significant delay is incurred in reversing a **wrongful** zoning board decision, and even when that delay causes the plaintiffs to default on their construction loans and lose everything to foreclosure, the Fourth Circuit has held that plaintiffs have not been deprived of procedural due process. *Sylvia Dev.*, 48 F.3d at 817, 827 (holding that 11 month delay in reversing wrongful zoning board decision did not deprive plaintiff of due process).

Greenspring speculates that it could take in excess of two years to overturn County decisions regarding its property. This delay, it believes, is unwarranted. But it cannot, on the one hand, demand due process in the review of County decisions, and on the other hand, claim that the time it would take to provide this process renders it unconstitutional.

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designation, and the refusal to exempt the plans from portions of the Division 2 procedures for plan approval. I assume for the purposes of the motion that as to its amended site plan, Greenspring did have a cognizable property interest in the Section 2 exemption from the height and floor area ratio requirements of the Ordinance. *See supra* at 8-10.

Substantive Due Process Claims

Greenspring alleges that the County deprived it of substantive due process when it refused to recognize that its amended site plan should be exempt from the height and floor area ratio requirements of the Ordinance.[13] This allegation fails to state a claim. As the Fourth Circuit summarized in *Front Royal:*

> [S]ubstantive due process is a substantially narrower concept than procedural due process, for it serves as an absolute check on certain governmental actions notwithstanding the fairness of the procedures used to implement those actions. We have determined that this absolute check is warranted only where no process could cure the deficiencies in the governmental action. In other words, governmental action offends substantive

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[13] Greenspring also pleads violations of substantive due process (facially and as applied) in regard to the County's enactment of the Ordinance, and its refusal to waive portions of the Division 2 plan approval process. For the reasons set forth *supra* at 8-10, these claims are dismissed for want of a constitutionally protected property interest. It is well settled that a claim of substantive due process under the "property prong of the Fourteenth Amendment" is not stated unless the claimant alleges possession of a property interest and that state action deprived the claimant of the property interest. *Sylvia Dev.*, 48 F.3d at 827. As explained in text, I assume for the purposes of the motion that Greenspring had a property interest in the Section 2 exemption from the height and floor area ratio requirements of the Ordinance, and that the County deprived it of this interest in refusing to acknowledge its exemption. Thus, my discussion of Greenspring's substantive due process claim centers on the Section 2 exemption.

> due process only where the resulting deprivation of life, liberty, or property is so unjust that no amount of fair procedure can rectify it.

135 F.3d at 287-88 (internal quotations and citations omitted). This high standard is not remotely satisfied here.

Greenspring's substantive due process claim fails because there exists a post-deprivation process which Greenspring is pursuing, which can rectify the deprivation. *Id.* Its appeal of the denial of the Section 2 exemption in state fora might result in its obtaining the exemption. In any event, the mere act of denying a Section 2 exemption falls far short of the type of state action which is "so arbitrary or irrational, so unjustified by any circumstance or governmental interest" that the "residual protections" of the equal protection clause are invoked. *See id.; accord Sylvia Dev.*, 48 F.3d at 827.

(iv)

For the reasons discussed above, I shall grant the County's Motion to Dismiss and dismiss all counts of Greenspring's second amended complaint with prejudice. A separate order follows.

Filed: September 27, 1999

/s/ Andre M. Davis
ANDRE M. DAVIS
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GREENSPRING RACQUET CLUB, INC., et al.,	:	Civil No. AMD 99-469
Plaintiffs	:	
v.	:	
BALTIMORE COUNTY, MARYLAND	:	
Defendant	:	

ORDER

(Filed Sept. 27, 1999)

In accordance with the foregoing Memorandum, it is this 27th day of September, 1999, ORDERED

(1) That the motion to dismiss is GRANTED; and it is further ORDERED

(2) That the Clerk shall CLOSE THIS CASE and TRANSMIT a copy of this Order and the foregoing Memorandum to all counsel.

/s/ Andre M. Davis
ANDRE M. DAVIS
United States
District Judge

IN THE UNITED STATES COURT
FOR THE DISTRICT OF MARYLAND

GREENSPRING RACQUET CLUB, INC., et al.,	:	
Plaintiffs	:	Civil No. AMD 99-469
v.	:	
BALTIMORE COUNTY, MARYLAND	:	
Defendant	:	

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MEMORANDUM

(Filed Nov. 30, 1999)

On September 27, 1999, I dismissed with prejudice the seven count complaint brought by plaintiff Greenspring Racquet Club, Inc.[1] *Greenspring Racquet Club, Inc. v. Baltimore County*, ___ F.Supp.2d ___, 1999 WL 1005135 (D.Md., Sep 27, 1999). Now pending is defendant Baltimore County's motion for attorney's fees pursuant to The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b). On the basis of the findings and conclusions set forth herein, I am persuaded that all of Greenspring's claims were "frivolous, unreasonable, [and] without foundation." *Bryant Woods Inn, Inc. v. Howard County*, 124 F.3d 597, 606 (4thCir. 1997). Accordingly, I shall award attorney's fees to the County in the amount of $33,522.50.

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[1] The individual principals of Greenspring were joined as plaintiffs, however, the fees award made here is solely against the corporate plaintiff, Greenspring Racquet Club, Inc.

(i)

Greenspring brought suit on January 29, 1999, in a disorganized eight count complaint naming ten defendants. At a hearing on April 21, 1999, I dismissed the complaint with leave to amend and with instructions to plaintiff's counsel to properly allege separate counts identifying their basis in law. On May 14, 1999, Greenspring filed a "Second Amended Complaint" alleging seven counts against the County challenging the County's enforcement of County Council Bill No. 111-98 ("the Ordinance") to prevent it from replacing its racquet club with one or more office towers more than three stories high.[2]

To summarize briefly, and reading Greenspring's complaint liberally as was required in respect to a motion to dismiss, *see Conley v. Gibson* 355 U.S. 41, 45-46 (1957), I found that Greenspring had alleged the County applied the Ordinance to effectuate an unconstitutional "taking" of their property without just compensation, and to violate constitutional guarantees of due process and equal protection of the laws. Greenspring sought relief pursuant to 42 U.S.C. § 1983 for deprivation of constitutional rights under color of state law. I dismissed with prejudice all of plaintiff's claims.

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[2] The property which is the subject of this litigation is a parcel consisting of approximately 5.5. acres located on the east side of Falls Road, north of Joppa Road in Baltimore County, Maryland.

The takings claims alleged a property interest sufficient to invoke a Fifth Amendment analysis,[3] however, they failed because Greenspring did not allege facts supporting its assertion that it had been deprived of "substantially all of the economic value of its property as a

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[3] I found Greenspring had made a sufficient showing for purposes of the motion to dismiss that it had a cognizable property interest because it was allegedly entitled to a nondiscretionary exemption from the Ordinance (as provided in Section 2 thereof). *See Greenspring Racquet Club, Inc.*, 1999 WL 1005135 at *4; *see Gardner v. City of Baltimore*, 969 F.2d 63, 68 (4th Cir. 1992). However, Greenspring alleged a series of other affected property interests which even a cursory review of well-established law would have discounted. For example, Greenspring alleged a "title taking" but this was purely a symbolic title taking, unsupported in precedent, since Greenspring did not allege that the County had altered or encumbered its title in any way. Greenspring alleged the County had taken its rights in the airspace above its property, but the invalidity of such a property interest has been crystal clear at least since the Supreme Court's 1978 decision *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 130 (1978). Greenspring asserted a "vested property right" in the development it would have been able to achieve under the zoning law applicable to its property prior to the enactment of the Ordinance. However, it is well-settled in Maryland that such a right does not vest unless the property owner had acquired a building permit under the old law and had commenced construction. *Prince George's County v. Sunrise*, 330 Md. 297, 623 A.2d 1296 (1993); *Richmond Corp. v. Board of Prince George's County*, 254 Md. 244, 255 A.2d 398 (1969). Greenspring never acquired a permit under the old law and had not commenced demolition and construction. Greenspring alleged other property interests which were just as obviously legally unsupportable as these. *See Greenspring Racquet Club, Inc.*, 1999 WL 1005135 at *3-4.

consequence of its failure to obtain the desired exemption." *See Greenspring Racquet Club, Inc.*, 1999 WL 1005135 at *4. This well-established element of a takings claim was reiterated by the Supreme Court as recently as 1996 in *Dolan v. City of Tigard*, 512 U.S. 374, 384-85 (1994).

The equal protection claims failed because Greenspring alleged neither that a fundamental right had been compromised nor an invidious motive, either of which would have triggered heightened scrutiny.[4] Instead, rational basis review was appropriate, and the County's actions in enacting and enforcing the Ordinance were clearly justified by legitimate concerns about traffic congestion, protection of rural zones and other land use purposes. *See Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 828-29 (4th Cir. 1995).

The procedural due process claim failed because the projected delay of two years to pursue administrative and judicial appeals does not constitute an unconstitutional burden. *See Greenspring Racquet Club, Inc.*, 1999 WL 1005135 at *5. Substantive due process was not violated because a post deprivation procedure exists which can

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[4] I note that Greenspring has suggested in neither its original complaint nor its amended complaint (or in its memoranda in opposition to defendant's motions to dismiss) that this case involved one of that narrow class of "vindictive action" equal protection cases recognized by some circuits. *See Olech v. Village of Willowbrook*, 160 F.3d 386, 388 (7th Cir. 1998), *cert. granted*, 120 S.Ct. 10 (1999), 68 U.S.L.W. 3177 (U.S. September 28, 1999). Thus, its belated citation to *Olech* (in its opposition to the defendant's motion for attorney's fees) as providing a non-frivolous basis for one or more of its equal protection claims is unavailing.

rectify any wrongful deprivation, and indeed Greenspring is pursuing that process. *Id.* at *6. In any event, I found that denial of the Section 2 exemption fell "far short of the type of state action which is 'so arbitrary or irrational, so unjustified by any circumstance or governmental interest' that the 'residual protections' of the equal protection clause are invoked." *Id.* (*citing Sylvia Dev. Corp.*, 48 F.3d at 827).

(ii)

As a preliminary matter, Greenspring asserts that the County's motion for attorney's fees should not be considered because it was filed three days late. However, because the County has demonstrated good cause that the short, nonprejudicial delay in filing its application was the result of excusable neglect, I exercise my discretion under Fed. R. Civ. P. 6(b)(2) to accept the fees motion.

Rule 6(b)(2) provides that: "[T]he court for cause shown may at any time in its discretion . . . permit [a motion to be filed after the time period specified in the rules] when . . . the failure to [timely file] . . . was the result of excusable neglect." "Excusable neglect" is "inadvertence, mistake, or carelessness," *In re SPR Corp.*, 45 F.3d 70, 72 (4th Cir. 1995) (interpreting "excusable neglect" provision of Bankruptcy Code), which is excusable, " 'taking account of all relevant circumstances surrounding the party's omission.' " *Id.* (*quoting Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 395 (1993) (interpreting "excusable neglect" provision of Bankruptcy Code)). In particular, courts are to exercise an equitable discretion to alter time

limits after considering four factors: "(1) the danger of prejudice to the . . . nonmovant, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith." *Id.* (internal quotations omitted).

I have considered each of these factors and I find that they militate heavily in favor of acceptance of the County's motion for attorney's fees. Greenspring does not allege that it has been prejudiced by the County's three-day delay in filing its fees motion. The delay was a brief one and had no impact on these proceedings. The judgment of dismissal is now on appeal to the Fourth Circuit and the minor delay has not impeded the prompt resolution of the motion. Any appeal of the instant decision on the County's motion for attorney's fees might be easily joined with the appeal on the merits of Greenspring's claims.

Moreover, as affirmed in the affidavit of the lead attorney for the County, the reason for the delay was a personal family emergency utterly beyond his control to predict or anticipate; it was perfectly understandable that he would temporarily be distracted from some of his professional obligations such as the fees motion deadline in this case. Thus, for these reasons, and because, in fact, the attorney for the County did not rely upon his personal circumstances as an excuse to seek a long delay, I

find that the County attorney acted in good faith. Accordingly, I deem the County's motion for attorney's fees is timely filed.[5]

(iii)

As amended, 42 U.S.C. § 1988(b) provides in pertinent part, "In any action or proceeding to enforce a provision of section . . . 1983 . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." Because the County's motion to dismiss was granted on all counts, the County was clearly the prevailing party here.

Section 1988(b) is part of the Congressional scheme to promote enforcement of constitutional and civil rights law by private parties. *Hughes v. Rowe*, 449 U.S. 5, 14 (1980); *see also Christiansburg Garment Company v. EEOC*, 434 U.S. 412, 418 (1978) (setting standard for attorney's fees awards to defendants in actions under Title VII of the Civil Rights Act of 1964).[6] Thus, a different standard applies to determine whether fees will be awarded when a *defendant* prevails. As the Supreme Court explained, "To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to

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[5] To be sure, the County should have filed a formal motion to enlarge time contemporaneously with the filing of its motion for attorney's fees.

[6] The same standard applies to defendants' fees claims under § 1988 as under Title VII. *Hughes*, 449 U.S. at 14.

promote vigorous enforcement . . . " *Id.* at 422. Congress specifically intended the attorney's fees provision to "make it easier for a plaintiff of limited means to bring a meritorious suit." *Id.* at 420. A second factor cited by the Supreme Court as discouraging fee awards to defendants in civil rights suits is the fact that an attorney's fee award to a prevailing plaintiff is an award "against a violator of federal law." *Id.* at 418.

The absence of these factors when a defendant prevails in such cases dictates that an award of attorney's fees to a defendant must be based on the "quite different equitable considerations," *id.* at 419, of discouraging groundless lawsuits. *Id.* at 420. Hence, "a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.* at 421. *See also DeBauche v. Trani*, 191 F.3d 499, 510 (4th Cir. 1999); *Bryant Woods Inn, Inc.*, 124 F.3d at 606. "In applying these criteria," the Supreme Court cautioned, "it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Christiansburg*, 434 U.S. at 421-22.

Applying the *Christiansburg* criteria to the present case dictates a grant of attorney's fees to the County. In particular, Greenspring's takings claims were without legal foundation. Greenspring asserted numerous theories of a property interest which were unjustly infringed by the County's actions. Only one of these theories had legitimate legal support. *See supra* n. 2 and accompanying

text. But even as to this theory of property interest, Greenspring's takings claims failed because Greenspring failed to allege (and it could not allege) any facts supporting the well-established element of a takings claim that it had been deprived of "substantially all" economic value of its affected property. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Thus, I find that these takings claims were "frivolous, unreasonable, [and] . . . without foundation." *Christiansburg*, 434 U.S. at 421-22.

Greenspring's due process and equal protection claims were even less well-founded. Even assuming a future appellate reversal of a wrongful decision in the state litigation regarding Greenspring's property, the alleged delay "in excess of two years" that Greenspring anticipated in the appeals process clearly does not rise to the level of a denial of due process. *See Sylvia Dev. Corp.*, 48 F.3d at 817, 827. As I explained in my earlier opinion, Greenspring "cannot, on the one hand, demand due process in the review of County decisions, and on the other hand, claim that the time it would take to provide this process renders it unconstitutional." *See Greenspring Racquet Club, Inc.*, 1999 WL 1005135 at *5. Likewise, Greenspring's substantive due process claim fell undeniably and woefully short of the type of state action which is " 'so arbitrary or irrational, so unjustified by any circumstance or governmental interest' that the 'residual protections' of the equal protection clause are invoked." *See Greenspring Racquet Club, Inc.*, 1999 WL 1005135 at *6 (*quoting Front Royal v. Town of Front Royal*, 135 F.3d 275, 288 (4th Cir. 1998)).

Any minimally attentive law student could have told Greenspring that its equal protection claims lacked legal

basis. It did not allege any basis for heightened scrutiny of the County's actions, and those actions were clearly justified as rationally related to legitimate land use concerns. *See Greenspring Racquet Club, Inc.*, 1999 WL 1005135 at *4-*5.

At bottom, none of Greenspring's confused bluster about abstention could obscure the fact that its federal lawsuit was "frivolous, unreasonable, . . . [and] without foundation." The mere fact that in *other* cases complaints alleging *materially dissimilar facts* survived motions to dismiss (or supported reasonable requests for temporary federal court abstention), when they were alleged in support of legal claims like those Greenspring undertook to assert here, does not militate in favor of a finding that Greenspring's claims were substantially justified as reasonable and non-frivolous. Accordingly, the County is entitled to an award of reasonable attorney's fees as a prevailing defendant in a case asserting "frivolous [and] unreasonable [claims, wholly] without foundation."

(iv)

The County requests attorney's fees in the amount of $36,829.[7] In accordance with the local rules of this Court,

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[7] Greenspring has limited its challenge to the fees request to the grounds discussed in the text and it has not objected in any manner to the *bona fides* or genuineness of the affidavits submitted by counsel spelling out their work in this case or the reasonableness and necessity for the work that the County's attorneys performed on the County's behalf. Furthermore, Greenspring has not objected to the fact – and therefore I deem Greenspring to have waived the issue – that the County has

the County provided to Greenspring quarterly statements documenting its intention to seek attorney's fees at the conclusion of the case. *See* Rules of the United States District Court (Md.), Appendix B, *Rules and Guidelines for Determining Lodestar Attorneys' Fees in Civil Rights and Discrimination Cases*, 1(c). These statements indicated the County would seek $25,605 in fees for the first quarter of litigation, and $18,000 for the second quarter.

Though attorneys employed by the Office of the County Attorney do not normally maintain time sheets, the attorneys handling this case recorded their time because, from the start, they perceived Greenspring's claims to be frivolous, and they decided they would lay the foundation for the unusual measure of seeking defendants' attorney's fees. Motion for Attorney's Fees at 7-8. According to these time sheets, the lead attorney on the case, Jeffrey Grant Cook, Esq., devoted 97.4 hours to the case during the first quarter, and 70 hours during the second quarter of litigation. The County Attorney, Virginia W. Barnhart, Esq., a more senior member of the Bar, expended 13.7 hours conferencing with Cook and reviewing his papers during the first quarter.

Pursuant to local rule "only one lawyer is to be compensated for intra-office conferences . . . [except more

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used a market-rate compensation formula in its motion for attorney's fees, notwithstanding the fact that each of the attorneys representing the County is one of its own salaried employees. *Cf. American Federation of Government Employees, AFL – CIO, Local 3882 v. Federal Labor Relations Authority*, 944 F.2d 922, 934-38 (D.C.Cir. 1991) (using market-rate compensation formula in awarding fees to salaried attorneys of union in Back Pay Act case).

than one lawyer may be compensated for] periodic conferences [that] are reasonably necessary for the proper management of the litigation." Accordingly, both Cook and Barnhart shall be credited for the 0.8 hour strategy conference held on February 3, 1999, at the commencement of the federal litigation, and both shall be credited for the 0.4 hour strategy conference held on March 12, 1999. The award for Cook's time is reduced by 12.5 hours for the additional time spent conferencing with Barnhart, because Barnhart will be credited for that time. Thus, Barnhart shall be credited for a total of 13.7 hours, and Cook for 84.9 for the first quarter and 70 for the second quarter, or a total of 154.9 hours.

John Beverungen, Esq., worked 15 hours during the first quarter and 10 hours in the second quarter. Four hours in the first quarter are subtracted because Cook was already credited for attending the hearing on April 21, 1999, and local rules allow for the compensation of only one attorney at a hearing. *Id.*, Appendix B, 2(d). Thus, Beverungen shall be credited for 11 hours in the first quarter and 10 hours in the second, or 21 total hours.

Pursuant to Local Rule 109.2b, the County submitted an affidavit to support its request for $190.00 per hour for all attorneys, as the "the customary fee for such work in the local community."[8] That affidavit was authored by K.

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[8] This fee request is consistent with the guidelines in the appendix to the local rules stating that for lawyers of more than eight years experience, which each of these lawyers have, the permitted hourly rate is between $190 and $225. Appendix B, Rule 3(b). However, I grant Cook and Beverungen the lower amount of $175 per hour in accordance with the County's

Donald Proctor, Esq., an attorney in private practice in Towson, who is well-acquainted with the quality of work performed by the County's attorneys, and who was also well-qualified to offer an opinion as to the prevailing attorney's fees in the Towson market. He attested that an attorney of Barnhart's experience and background would customarily charge between $200 and $225 for her time. Attorneys of Cook's and Beverungen's experience and background would customarily charge between $175 and $190 per hour. Motion for Attorney's Fees, Ex. 6 p. 3. This evidence is unrebutted. Accordingly, I calculate the County's fee award based upon an hourly rate for Barnhart of $200 and for Cook and Beverungen of $175, as follows:

Attorney	Compensable Hours	Hourly Rate	Fees Awarded
Jeffrey Grant Cook	154.9	$175	$27,107.50
John Beverungen	21	$175	$3,675.00
Virginia Barnhart	13.7	$200	$2,740.00
		Total	$33,522.50

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affidavit concerning customary fees in the Towson market. I depart from the guidelines, in part, because these rates are set for attorney's fees awards to plaintiffs, not defendants, in civil rights cases, and they are based upon a survey of local attorneys concerning "the hourly rates paid on the defense side . . . adding an upward adjustment to account for the risk of nonpayment faced by a plaintiff's lawyer in the event her client does not prevail." *Id.* n. 5. Clearly, as the *defendant's* attorneys, Cook, Beverungen and Barnhart are not entitled to an upward adjustment.

(v)

For the foregoing reasons, I grant the County's Motion for Attorney's Fees and make an award in the amount of $33,522.50. A separate order follows.

Filed: November 30, 1999 /s/ Andre M. Davis
ANDRE M. DAVIS
United States District Judge

IN THE UNITED STATES COURT
FOR THE DISTRICT OF MARYLAND

GREENSPRING RACQUET CLUB, INC., et al.,	:	
Plaintiffs	:	Civil No. AMD 99-469
v.	:	
BALTIMORE COUNTY, MARYLAND	:	
Defendant	:	

. . . o0o . . .

ORDER

(Filed Nov. 30, 1999)

In accordance with the foregoing Memorandum, it is this 30th day of November, 1999, by the United States District Court for the District of Maryland ORDERED

(1) That the defendant's motion for attorney's fees is GRANTED; and it is further ORDERED

(2) That Defendant Baltimore County is AWARDED attorney's fees in the amount of $33,522.50, AND JUDGMENT FOR THAT AMOUNT, THIRTY-THREE THOUSAND, FIVE HUNDRED TWENTY-TWO AND 50/100 DOLLARS, IS HEREBY ENTERED IN FAVOR OF BALTIMORE COUNTY, MARYLAND AGAINST PLAINTIFF GREENSPRING RACQUET CLUB, INC., ONLY; and it is further ORDERED

(3) That the Clerk TRANSMIT copies of the foregoing Memorandum and this Order to all counsel of record.

/s/ Andre M. Davis
ANDRE M. DAVIS
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND, NORTHERN DIVISION

GREENSPRING RACQUET CLUB, INC., et al.,	)	
Plaintiffs,	)	
	)	Case No. AMD99-469
vs.	)	
BALTIMORE COUNTY, MARYLAND,	)	
Defendant.	)	

PLAINTIFFS' MOTION TO STAY

Come now plaintiffs, pursuant to the Court's Order entered on April 22, 1999, and move that the Court enter its Order staying all proceedings on plaintiffs' Second Amended Complaint until the further order of the court, except as set forth in plaintiffs' supporting Memorandum of Law filed concurrently herewith which is made a part hereof by reference.

Respectfully submitted,

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and

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Federal Bar Number: 01367

ATTORNEYS FOR
PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of May, 1999, copies of plaintiffs' above and foregoing Motion to Stay, were mailed by United States mail, first class postage prepaid, addressed to defendant's following attorneys:

Virginia W. Barnhart

County Attorney
Courthouse, Second Floor
400 Washington Avenue
Towson, Maryland 21204

Jeffrey Grant Cook
Assistant County Attorney
Courthouse, Second Floor
400 Washington Avenue
Towson, Maryland 21204

John E. Beverungen
Assistant County Attorney
Courthouse, Second Floor
400 Washington Avenue
Towson, Maryland 21204

/s/ Robert H. Freilich
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, NORTHERN DIVISION

GREENSPRING RACQUET CLUB, INC., et al.,	)	
Plaintiffs,	)	
	)	Case No. AMD99-469
vs.	)	
BALTIMORE COUNTY, MARYLAND,	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STAY

Introduction

Concurrently with the filing of plaintiffs' Second Amended Complaint in this action, and as suggested by the Court at the hearing held on April 21, 1999, plaintiffs have also filed a new state court action in the Circuit Court for Baltimore County, Maryland, which sets forth causes of action solely under the laws and Constitution of the State of Maryland. A copy of that state court complaint is attached hereto as **Exhibit A**.

As an Examination of plaintiffs' respective new state complaint and federal complaint will confirm, and again being responsive to the Court's suggestion, it is plaintiffs' intention (1) first to litigate to a conclusion all of its claims under Maryland law in the state court, and (2) only then, after exhausting all of its state court remedies, to litigate its instant federal claims of facial, as applied and ripe Constitutional violations, if it is still necessary to do so.

The Court will note that the same fact issues are involved in both pending proceedings. This is precisely why Your Honor dismissed without prejudice Case No. AMD 99-231. See, Order dated April 22, 1999, and partial transcript of the April 21, 1999 hearing, p. 9, attached hereto as **Exhibit B***.

As the Court informed counsel at the time, **Exhibit B**, p. 8:

> . . . [P]laintiff will be given leave to institute an action in state court in the nature of inverse condemnation, or whatever they want to call it. . . . And you will proceed in state court with an express reservation so you don't run into a res judicata or a collateral estoppel bar – well, collateral estoppel maybe, but you won't run into a res judicata bar. *An then, when all is said and done in state court, then you will come back, and we will proceed with your facial claim, your as-applied claim, and your now ripe takings claim.* (Emphasis supplied)

Discussion

Although the Court contemplated that some of plaintiffs' federal claims might be challenged pursuant to a Rule 12(b) (6) motion, it acknowledged that "other federal claims will be stayed" pending the outcome of the state court action which has now been filed. **Exhibit B**, p.

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* During the hearing, the Court inadvertently referred to its intended dismissal without prejudice of Case No. AMD 99-469 when it meant Case No. 99-231. **Exhibit B**, p. 9. Presumably, the correct reference is reflected in the Order as entered.

8. Plaintiffs submit, however, that an order staying further proceedings on all of plaintiffs' federal claims, not just some of them, should be entered.

Without reiterating all of the arguments advanced by the parties previously, it is evident that it is the Court's hope that, as a result of the concurrent state court litigation, it may become unnecessary to proceed with the instant action at all. If plaintiffs do prevail in the state court action, that will certainly be the case.

Given the non-prejudicial nature of the dismissal of Case No. AMD 99-231, it is equally evident that the Court desires to stay further proceedings in *this* case or, stated otherwise, to *abstain* from addressing plaintiffs' federal claims consistent with a so-called *Pullman* abstention. In *Railroad Commission of Texas v. Pullman Co.* 312 U.S. 496, 61 S. Ct. 643, 85 L.Ed. 971 (1941), the Supreme Court ruled that such an abstention is indeed proper where, as here, (1) a sensitive area of social policy is involved that the district court does not want to consider if avoidable; (2) a state court ruling could obviate the need for such a federal adjudication; and (3) the proper resolution of the state court issues remains uncertain pending the outcome of the state court action.

As noted in *Northern Virginia Law School, Inc. v. City of Alexandria*, 680 F.Supp. 222, 225 (E.D. Va. 1988), a *Pullman* abstention "is closely related to the ripeness issue," the very thing this Court expressed its concern about. *Cf., Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

In indicating its willingness to consider a stay, the Court was obviously mindful, as noted in *Northwest Forest Resource Council v. Robertson*, 711 F.Supp. 1039 (D.Or. 1989), that whether to stay an action, until the resolution of a similar action in another court, is a matter committed to the sound discretion of the trial court. Where many of the identical issues are involved, *Northwest Forest* notes, a stay is appropriate. See also, *EFCO Corp. v. Aluma Systems, USA; Inc.*, 983 F.Supp. 816 (S.D.Iowa 1997)

Evergreen Marine Corp. v. Welgrow Intern. Inc., 954 F.Supp. 101 (S.D.N.Y. 1197) also ruled that a stay was within the inherent power of the court based on the pendency of a related proceeding in another jurisdiction. Among the relevant factors enumerated in *Evergreen* which support the granting of a stay are: the similarity of parties and issues; the promotion of judicial efficiency; the adequacy of relief available in other forum; fairness to and convenience of the parties and counsel; the possibility of prejudice to the parties; and the temporal sequence of the filing of the actions. Although no one factor is dispositive, it is apparent that virtually all of them are present in the instant case.

Cited in *Evergreen*, is the seminal case of *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 814, 96 S.Ct. 1236, 47 L.Ed.2d 483, 496 (1973), where the Supreme Court ruled that the doctrine of federal abstention is particularly appropriate in cases involving, as does the instant case, federal constitutional issues which might be mooted or later presented in a different posture by reason of a state court determination of pertinent state law.

It was further ruled in *Colorado River* that in deciding whether to stay an action in favor of parallel litigation in a state court, "a federal court should consider 'wise judicial administration, . . . conservation of judicial resources, and comprehensive disposition of litigation." *Id.* at 424 U.S. 817, 96 S.Ct. 1246.

In short, the sound exercise of the Court's discretion in this case clearly justifies the entry of a stay for all of the above cited reasons.

Where state administrative or judicial remedies need to be exhausted to pursue 42 U.S.C. § 1983 actions for as applied land use claims alleging the violation of federal due process and equal protection rights, a federal court can enter a stay to await the conclusion of state court proceedings. *Front Royal v. Town of Front Royal, Virginia*, 135 F.3d 275, 282 (4th Cir. 1998). At that time, a plaintiff's federal claims can be litigated, if necessary, where, as here, an *England* reservation has been asserted.

About one thing the parties will not doubt agree. Given the unsettled posture of both the state and federal actions, no useful purpose will be served by rehashing issues that might not have to be addressed. More than enough time and "lawyering" have already been invested by both sides. Therefore, plaintiffs submit that a review of *all* federal issues in the instant case should be stayed pending the outcome of the state court litigation, including a review of plaintiffs' substantive due process claim regarding which the Court expressed skepticism.

Defendant should, of course, be required to file its answer or otherwise timely respond to plaintiffs' Second Amended Complaint. If it so elects, it might even be

allowed to file a Rule 12(b) (6) motion to dismiss. Plaintiffs suggest, however, that supporting and opposing Memoranda of Law should not be required at this time, pending the outcome of the state court litigation. In the event the necessity of ruling on any of the federal issues is hereafter obviated, there is no reason to further impose on the Court's time now.

Conclusion

For each of the above reasons, all further proceedings herein should be stayed, provided, however, defendant should be required to file its Answer or otherwise respond to plaintiff's Second Amended Complaint with the understanding that (1) supporting and opposing Memoranda of Law, and (2) consideration by the Court of any Rule 12(b) (6) motion to dismiss will also be stayed until further Order of the Court.

For the convenience of the Court, a proposed form of stay Order is attached hereto.

Respectfully submitted,

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and

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Facsimile: (410) 296-2541
Federal Bar Number: 01367

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of May, 1999, copies of plaintiffs' above and foregoing Memorandum of Law in Support of Motion to Stay, were mailed by United States mail, first class postage prepaid, addressed to defendant's following attorneys:

Virginia W. Barnhart
County Attorney
Courthouse, Second Floor
400 Washington Avenue
Towson, Maryland 21204

Jeffrey Grant Cook
Assistant County Attorney
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400 Washington Avenue
Towson, Maryland 21204

John E. Beverungen
Assistant County Attorney
Courthouse, Second Floor
400 Washington Avenue
Towson, Maryland 21204

/s/ Robert H. Freilich
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND, NORTHERN DIVISION

GREENSPRING RACQUET CLUB, INC., et al.,	)	
Plaintiffs,	)	
	)	Case No. AMD99-469
vs.	)	
BALTIMORE COUNTY, MARYLAND,	)	
Defendant.	)	

ORDER

Plaintiffs' Motion for Stay coming before the Court, and for good cause shown, all further proceedings on plaintiffs' Second Amended Complaint shall be, and hereby are, stayed until further order of the Court, provided, however: (1) defendant shall timely file its Answer or otherwise respond by motion to said Second Amended Complaint; (2) in the event defendant shall file a Rule 12(b) (6) motion to dismiss, plaintiffs and defendant shall not be required to file, nor shall they file, their respective

supporting or opposing Memoranda of Law until further order of the Court; and (3) nothing contained herein shall prohibit defendant from hereafter filing a motion to lift this stay for good and sufficient reason.

IT IS SO ORDERED.

ANDRE M. DAVIS
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND, NORTHERN DIVISION

GREENSPRING RACQUET CLUB, INC. 10803 Falls Road Lutherville, Maryland **and** **WILLIAM HIRSHFELD** 3604 Barberry Court Baltimore, Maryland 21208 **and** **LORETTA HIRSHFELD** 3604 Barberry Court Baltimore, Maryland 21208 **Plaintiffs,** **v.** **BALTIMORE COUNTY, MARYLAND** A Body Corporate and Politic Serve: Virginia Barnhart, Esq. County Attorney 400 Washington Avenue, 2nd Floor Towson, Maryland 21204 **Defendant.**	**Case No. AMD99-469** **SECOND AMENDED COMPLAINT**

SECOND AMENDED COMPLAINT

COME NOW Plaintiffs Greenspring Racquet Club, Inc., a Maryland corporation, William Hirshfeld, an individual, and Loretta Hirshfeld, an individual, and for their

causes of action against Defendant Baltimore County, Maryland, acting under color of the statutes, laws, customs, ordinances and usage of the State of Maryland and Baltimore County, complain and allege:

ALLEGATIONS COMMON TO ALL COUNTS

1. Plaintiff Greenspring Racquet Club, Inc. (hereafter "Greenspring") is a company incorporated in the State of Maryland, with its principal place of business in Baltimore County, Maryland, and is the lessee of a tract of land consisting of approximately 5.5768 acres and located on the east side of Falls Road, north of Joppa Road in Baltimore County, Maryland (hereinafter referred to as the "Property"). Greenspring is a person within the jurisdiction of the State of Maryland deprived of rights secured by the laws and the Constitution of the of the [sic] United States and amendments thereto, all within the meaning of 42 U.S.C. § 1983.

2. Plaintiffs William Hirshfeld and Loretta Hirshfeld are the lessors and owners of the Property by virtue of certain deeds recorded among the Land Records of Baltimore County, Maryland, as otherwise. William and Loretta Hirshfeld are persons residing within the jurisdiction of the State of Maryland. William Hirshfeld and Loretta Hirshfeld have been deprived of rights secured by the laws and the Constitution of the United States and amendments thereto, all within the meaning of 42 U.S.C. § 1983.

3. Defendant, Baltimore County, Maryland (hereinafter the "County" or "Defendant") is a body corporate and politic created and existing under the laws of the State of Maryland, empowered to act in accordance with those laws, and with the right to sue and be sued in any court of competent jurisdiction.

Defendant Baltimore County, Maryland is a "person" and, at all times alleged herein, acted under color of the statutes, laws, customs, ordinances and usage of the State of Maryland and Baltimore County and deprived Plaintiffs of rights secured by the laws and the Constitution of the United States and amendments thereto, all within the meaning of 42 U.S.C. § 1983.

4. Baltimore County Council is a legislative body and instrumentality of Baltimore County, Maryland. Baltimore County Council is a "person" and, at all times alleged herein, acted under color of the statutes, laws, customs, ordinances and usage of the State of Maryland, and Baltimore County and deprived Plaintiffs of rights secured by the laws and the Constitution of the State of Maryland.

5. S. G. Samuel Moxley, Kevin Kamenetz, T. Brian McIntire, Vincent J. Gardina and Joseph Bartenfeld are all Council Members of the Baltimore County Council, are "persons" and, at all times alleged herein, acted in their official capacities and under color of the statutes, laws, customs, ordinances and usage of the State of Maryland and Baltimore County, and deprived Plaintiffs of rights secured by the laws and the Constitution of the State of Maryland.

6. Baltimore County Department of Permits and Development Management (hereinafter "PDM") is a department, agency and instrumentality of Baltimore County and is created and empowered under the provisions of Title 2, Article III, Section 2-56 of the Baltimore County Code (hereafter referred to as "County Code"). Pursuant to that section, the department is "established for the purpose of administering and enforcing the development process, zoning regulations, permitting and licensing

process, and laws and responsibilities previously performed by [, . . . [A]ll of the activities, duties, functions and responsibilities previously performed by [, . . . among others,] the office of zoning administration and development management . . . are transferred to the department of permits and development management." Baltimore County Department of Permits and Development Management is a "person" and, at all times alleged herein, acted under color of the statutes, laws, customs, ordinances and usage of the State of Maryland and Baltimore County and deprived Plaintiffs of rights secured by the laws and the Constitution of the United States and amendments thereto, all within the meaning of 42 U.S.C. § 1983.

7. Arnold Jablon is the Director of the PDM. The position of Director is established by Section 2-57 of the Baltimore County Code, pursuant to which the Director shall administer the department. Jablon is sued in his official capacity as the Director of the PDM. Jablon is an employee of Defendant Baltimore County and was acting within the course and scope of his employment.

8. Jurisdiction is conferred by 28 U.S.C. § 1331, 28 U.S.C. § 1343 and 42 U.S.C. § 1983 in that this civil action arises under the Constitution of the United States and laws of the United States, including 42 U.S.C. §§ 1983 and 1988, to recover damages and/or to secure equitable or other relief under any Act of Congress to redress the deprivation, under color of any state law, statute, ordinance, rule, regulation, custom or usage, of any right secured by the Constitution of the United States or any Act of Congress for the protection of civil rights.

9. The filing of this Second Amended Complaint was authorized by Order of this Court dated April 22, 1999.

10. This action concerns the facial validity of legislation (Bill Number 111-98) and Defendant's unlawful application of specific land use controls, including but not limited to Bill Number 111-98, to property zoned BL, BR or BM, including Plaintiffs' Property, and concerns the "official actions" (e.g., governmental custom, policy statements, ordinances, regulations and decisions officially adopted and promulgated by government officials) taken by Defendant, through its Department of Planning, Department of Public Works, Department of Permits and Development Management and County Council, under color of state law, to deprive Plaintiffs of rights secured under the Baltimore County Code and the laws and Constitution of the State of Maryland as hereinafter alleged in this Complaint.

11. The Property is located on the urban side of the "Urban Rural Demarcation Line" ("URDL") as established in the current Baltimore County 1989-2000 Master Plan (and in the "draft" 2010 Master Plan), indicating that, among other things, the Greenspring Station Area is currently served by water and sewer. The Master Plan specifically identifies the area in which the Property is located, as consisting of over 1.2 million square feet of office and commercial development, including the Property itself, as a major center, commercial node and gateway to provide for economic development for the County, to concentrate urban and commercial development to prevent urban sprawl and strip commercial development from locating throughout the County and in the Resource Conservation Areas, and not as a "buffer zone" for Resource Conservation Areas.

12. The Property is currently zoned "Business, Major" ("BM"), Section 233, Baltimore County Zoning Regulations. But for the recent adoption of Bill No. 111-98 (Section 235C of the Baltimore County Code) (hereinafter referred to as "Bill No. 111-98), the proposed development by Plaintiffs, as hereinafter described, would be permitted pursuant to existing BM zoning standards, razing the existing structures on the Property and constructing thereon an office building or buildings and a structured parking garage. Plaintiffs have amended the previously approved Site Plan dated May 9, 1975, and approved in final form by the designee of the Director of the Office of Planning and Zoning on June 12, 1975, authorizing, the construction of the racquet club facility on the Property. The "footprint" (meaning the area of land upon which the improvements are situated) of the proposed development is measurably less than that of the building erected pursuant to the approval of June 12, 1975 as it now exists on the Property. There is adequate infrastructure and capacity (*i.e.*, adequate public facilities, transportation, sewer, water and storm drainage), which are currently being used by the existing athletic/racquet club, to accommodate the proposed development.

13. Plaintiffs' proposed development on the BM-zoned property would replace its existing commercial uses and (a) has no adverse impact on the objectives of preserving agricultural, natural and rural resources; (b) is consistent with the purposes and objectives upon which the Master Plan and zoning land uses are based to enhance economic development of the County, to control urban sprawl and prevent strip commercial development within Resource Conservation Areas; and (c) is consistent with the purposes and objectives of the State of Maryland's "Smart Growth" legislation, as follows:

(a) The Economic Growth Resource Protection and Planning Act Amendments of 1992, Article 66B, Annotated Code of Maryland, Zoning and Planning, § 306(b), which requires counties to make recommendation for streamlining of development regulations in areas designated for growth and to concentrate development in suitable areas;

(b) The State Finance and Procurement Code Amendments of 1997, Section 5-7B-01, Annotated Code of Maryland, which requires the State to concentrate its project funding in "priority funding areas" consisting of municipalities, existing communities, industrial areas and planned growth areas.

14. All designated Rural Conservation zoning districts (RC zones) are physically separated from Plaintiffs' Property by multi-story office and retail buildings, the nearest RC zone being over 150 feet away. Plaintiffs' Property is not contiguous to any RC zone and is separated from the RC zones by OR-1 and DR-1 zoning districts.

15. On October 5, 1998, Defendant passed Bill No. 111-98, which imposed certain additional restrictions on property in BM zones located within 750 feet of RC zones, specifically, a building height restriction of 35 feet and a floor area ratio ("FAR") of 0.5.

16. By designating and protecting RC zones pursuant to Bill No. 111-98, Defendant purports to protect those values and objectives upon which RC zones were originally based: to reduce consumption and use of prime agricultural land, critical watershed areas and other natural resources; and to discourage undesirable land use patterns and urban sprawl within the RC zones.

17. Bill No. 111-98 fails to rationally or reasonably promote or protect the goals, objectives and values established (a) for RC zones, within 750 feet of Plaintiffs' Property; and (b) for the commercial node and gateway center of Greenspring Station; and neither does it rationally or reasonably promote or protect the goals, objectives, policies and strategies of the Baltimore County Master Plan or zoning ordinance taken as a whole.

18. Bill No. 111-98 does not apply to similarly situated properties in the BL, BM and BR zones, designated as a "C.R.I.M., C.T. or C.C.C. District" or a "planned unit development or in the White Marsh or Owings Mills growth areas," even where such zoning districts are contiguous to, abut and directly adjoin RC zoning districts, in which office or commercial development may exceed 35 feet and 0.5 FAR. Such disparate treatment is arbitrary and capricious and has no rational basis.

19. Bill No. 111-98 places specific height and area restrictions on certain types of uses and zones (*i.e.*, properties zoned BL, BM, and BR) and not on other identical uses within the OR, OT, ML, MH and MLR zones, among others, that are similarly situated in relation to RC zoning throughout the County.

20. Bill No. 111-98 prohibits uses within specifically designated business zones (*i.e.*, BL, BM and BR) located on property within 750 feet of an RC zone that exceed a 35 foot height and a floor area ratio ("FAR") of 0.5 while not requiring compliance with such restrictions with regard to similarly situated uses and structures (*e.g.*, industrial facilities, office, commercial and manufacturing facilities) located in office and industrial zones which have rights to build in excess of the 35 foot height and 0.5 FAR and

which lie closer to and even contiguous with RC zones.

21. As indicated on the record and in correspondence between the Baltimore County Council and its constituents, Bill No. 111-98 was designed to single out two (2) specific properties of all of the sites zoned BL, BM or BR within the County, one of which is Plaintiffs' Property.

22. The adoption of Bill No. 111-98 represents bad faith action on behalf of Defendant, unlawfully transfers a public burden to discrete private lands, and intentionally creates a "circular pursuit," making it impossible (as a result of the new legislation, untenable relief provisions and undue administrative delay) for Plaintiffs to obtain the requisite development approvals that are lawfully vested for the Plaintiffs' Property.

23. Plaintiffs have vested interests in property which include property rights to the land and airspace up to the maximum building "height 'tent'," building height and FAR designated under the zoning regulations of the existing BM zone, and the provisions of Bill No. 111-98 constitute a permanent taking of the airspace rights of Plaintiffs' Property above thirty-five feet and an FAR of 0.5 and an illegal condition and restriction on development approval that fails to provide for studies and findings of nexus that relate to the generation of the need created by Plaintiffs' Property to take illegal exaction of an open space corridor for purported permanent protection of the Resource Conservation zones.

24. Plaintiffs' property rights located in the BM zone extend significantly beyond the 35 foot height and .5 FAR restrictions established pursuant to Bill No. 111-98.

25. Bill No. 111-98 fails to advance, and is not rationally related to, the objectives and purposes of either rural conservation or the goals, objectives, policies and strategies of the Master Plan and zoning ordinance to create urban nodes, gateways and centers that promote economic development, prevent urban sprawl in the rural conservation areas of the County and prevent degradation of air, water, traffic congestion and environmentally sensitive lands.

26. There exist RC-zoned lands identified for the conservation of agricultural activities and natural resources, which are adjacent to numerous, similarly-situated properties throughout the County bordering the URDL, which are not zoned BL, BM or BR but have office and industrial zoning which allow building and structures to exceed the height and area restrictions established by Bill No. 111-98.

27. The Property, as it is currently developed, was constructed pursuant to a Site Plan dated May 9, 1975 and approved in final form by the designee of the Director of the Office of Planning and Zoning on June 12, 1975.

28. Pursuant to authority vested by County ordinance, the Office of Zoning Administration and Development Management, which is the predecessor to the PDM, promulgated the "Development Management Policy Manual" (hereinafter the "DMPM") for the purpose of "governing the processing of plans and actions, or review associated therewith."

29. The DMPM created the "Development Review Committee" (hereinafter the "DRC") for the purpose of determining, in accordance with the Baltimore County Code, if a proposed development meets the criteria for an exemption from the development review and approval process, in its entirety or in part.

30. If a proposed development meets the criteria set forth in Section 26-171(b)(9) of the Baltimore County Code, then the PDM, through the DRC, must legally determine without any discretion that it is exempt from the Community Input Meeting and the Hearing Officer's Hearing requirements of Division 2 of the Development Regulations.

31. The Baltimore County Code defines "minor development" for the purposes of Section 26-171(b)(9) as "a development with 1) no public works agreement,. . . . " Section 26-168. The amendments to the Site Plan previously approved on June 12, 1975, as hereinbefore alleged, for the racquet club and athletic facility proposed by Plaintiffs, will not require a public works agreement for the improvements to be constructed and exempt the Plaintiffs' development proposal(s) from Community Input Meetings and the prolonged process of Hearing Officer review and *de novo* appeal to the Baltimore County Board of Appeals.

32. By letter dated June 10, 1998, Plaintiffs, by counsel, requested the PDM, through the DRC, to consider their proposed development of the Property and to grant an exemption from the requirements of Division 2 under Section 26-171(b)(9). The letter was attached to the amended Site Plan, which clearly indicated that no public works agreement was necessary for the Property as proposed. Furthermore, the letter indicated that Plaintiffs' proposed development was similar to other proposals which have consistently been granted the exemptions under Section 26-171(b)(9) of the County Code. Plaintiffs supplemented their request for a (b)(9) exemption by letter dated June 12, 1998, to which Plaintiffs attached a copy of the original approved Site Plan for the Property dated May 9, 1975, and approved on

June 12, 1975, as verification that the proposed amendment to the Site Plan was entitled to proceed according to the development process in effect in 1975.

33. Plaintiffs further supplemented their request on June 15, 1998 for their entitlement to the exemptions.

34. In each letter to PDM requesting the exemptions to which they are entitled, Plaintiffs, by and through counsel, provided the factual predicate and legal authority upon which no other finding could be made.

35. By letter dated June 17, 1998, the PDM indicated that it did not intend to acknowledge the exemption of the Plaintiffs' development proposal under Section 26-171(b)(9). The DRC met in an open meeting on June 22, 1998 to consider Plaintiffs' request for exemption. Plaintiffs are lawfully entitled to proceed exempt from the Community Input Meeting, and Hearing Officer Hearing requirements of Division 2 of the Development Regulations, without any discretion on the part of the County; and, the PDM, through the DRC, arbitrarily, capriciously and unreasonably refused to acknowledge the exemption; and, in violation of law, required Plaintiffs to proceed with the development process to include County Review Group (hereinafter "CRG") approval.

36. In view of the failure of the PDM, through the DRC, to acknowledge that Plaintiffs' proposed development of the Property is lawfully exempt from the Community Input Meeting and the Hearing Officer's Hearing requirements of Division 2 of the Development Regulations and exempt from CRG review, without any discretion on the part of the County, Plaintiffs are entitled to such an exemption and, as such, they are entitled to proceed to submit the

required plans for consideration by the appropriate permitting authorities, obtain the appropriate building permit(s) and proceed with construction of the development project without CRG review, Community Input Meeting or Hearing Officer's Hearing.

37. Bill No. 111-98, Section 2, provides that the bill's provisions limiting the maximum building height to 35 feet and FAR to 0.5 of any proposed building in the BL, BM or BR zone, the exterior wall of which is proposed to be within 750 feet of an RC zone, "shall not apply to . . . the redevelopment of an improvement existing on October 5, 1998 if (1) the improvement occurs within the same footprint, (2) the square footage, per story, of the proposed improvement is equal to or less than the square footage, per story, of the existing improvement, and (3) a public works agreement is not required, in the opinion of the Directors of Public Works, Permits and Development Management, and Environmental Protection and Resource Management."

38. By letter dated April 27, 1999, Plaintiffs, by counsel, requested PDM, through the DRC, to consider their proposed development of the Property and to grant an exemption from the requirements of Division 2 under Section 26-171(b)(9) and to recognize that the proposed development was exempt from the limitations of Bill No. 111-98 under Section 2 of the bill. The letter also noted that there was no legal basis upon which PDM could require any CRG review, or any other type of discretionary review, including the process known as JSPC review, which antedated CRG review and involved a review by the Planning Board. The letter was attached to an amended Site Plan (the "April 27, 1999 amended Site Plan"), which clearly indicated that no public works agreement was necessary for the Property as proposed, and that

the requirements for exemption from Bill No. 111-98, pursuant to Section 2 of the bill, were met; specifically, that (1) the proposed redevelopment is to occur within the same footprint as the existing racquet club, which existed prior to October 5, 1998, (2) the square footage, per story, of the proposed improvement, being 88,250 square feet, is less than the square footage, per story, of the existing racquet club, being 125,000 square feet, and (3) a public works agreement is not required. The April 27, 1999 amended Site Plan proposed the razing of the existing racquet club structures and the construction of one, eight-story office building, totaling 242,000 square feet of office space, and the construction of a multi-level parking garage, all to occur within the footprint of the existing buildings. furthermore, the letter indicated that Plaintiffs' proposed development was similar to other proposals which have consistently been granted the exemptions under Section 26-171(b)(9) of the County Code that Plaintiffs were seeking and contained conclusive evidence in support of that indication.

39. In its letter to PDM dated April 27, 1999 requesting the exemptions to which they are entitled, Plaintiffs, by and through counsel, provided a factual predicate and legal authority that the action required was a non-discretionary legal mandated duty upon which no other finding could be made.

40. The DRC met in an open meeting on May 10, 1999 to consider Plaintiffs' request for exemptions under Baltimore County Code section 26-171(b)(9) and Bill 111-98, section 2 that Plaintiffs are lawfully entitled to proceed exempt from the Community Input Meeting and Hearing Officer Hearing requirements of Division 2 of the Development Regulations and exempt from the requirements of Bill 111-98 without

any discretion on the part of the County; and, the PDM, through the DRC, arbitrarily, capriciously and unreasonably refused to acknowledge the exemption; and, in violation of constitutionally and statutory protected rights, required Plaintiffs to proceed in one of two ways: with the full current development process, without exemption therefrom or according to the development process known as JSPC Review, which includes Planning Board review, and which antedates the CRG approval process.

COUNT I

Procedural Due Process

41. Plaintiffs incorporate and adopt by reference the allegations in paragraphs 1 through 40 of this Complaint as though fully set forth in this Count 1.

42. Plaintiffs have a grandfathered property interest – a vested property right – to develop their Property in accordance with the existing BM zone standards, which provide for intensive development entitlements of height and floor area ratio.

43. The adoption of bill No. 111-98, by reason of its design and intent to directly affect two individual parcels of land within the County, resulted in rezoning which, as applied to Plaintiffs' Property, was quasi-judicial and not legislative in nature, thereby entitling Plaintiffs to due process of law in the adoption process of Bill No. 111-98, so as to reserve the protection of their existing entitlements and vested rights. Plaintiffs were entitled to and deprived of notice and a public hearing with the right to fully and comprehensively present their rights and the defects of the proposed law to the County Council, and were deprived of cross-examination of witnesses, the preparation of a record, findings of fact

and conclusions of law, all required under quasi-judicial proceedings, prior to destruction or alteration of their property interests, entitlements and vested rights in the adoption of Bill No. 111-98.

44. Bill No. 111-98 was adopted in bad faith because it is the product of conspiracy between Defendant and certain adjacent and nearby property owners and associations to specifically single out Plaintiffs' Property and that of another and defeat Plaintiffs' rights, thereby shifting what should have been a public burden (for an allegedly "public benefit") onto private landowners (Plaintiffs), and failed to provide Plaintiffs with notice and public hearing and the rights described in paragraph 39, and are in violation of the procedural due process provisions contained in the Fifth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983.

45. By committing each of the aforesaid acts, Defendant prohibited the use of the Property and thereby intended to cause and did cause a deprivation of rights secured by the Fifth and Fourteenth amendments to the United States Constitution and 42 U.S.C. § 1983, and knew or reasonably should have known that its actions as set forth above would and did violate Plaintiffs' rights secured by the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

46. The procedures for administrative relief established by Defendant under Bill No. 111-98 and the applicable Development Regulations of Bill No. 111-98 are based on standards which are identical to the provisions of the Act and are therefore illusory, fail to provide for an impartial tribunal, create unreasonable and abnormal procedural delays, create a "circular pursuit" situation wherein procedures are

modified so as to make relief perpetually illusive, require an effort in futility wherein administrative relief will never be obtained, resulted in the arbitrary, capricious, irrational and unreasonable denial of Plaintiffs request for exemption therefrom as alleged in paragraph 40, and are otherwise defective and in violation of the procedural due process provisions contained in the Fifth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983.

47. As a direct and proximate result of the actions of Defendant as set forth above, Plaintiffs have been unconstitutionally precluded from economically viable and reasonable uses of their Property, have been injured and damaged in an amount in excess of $5,000,000, and have incurred and will incur attorneys' fees, consultant and expert fees, as well – as other expenses which they are entitled to recover pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. §§ 1983 and 1988.

WHEREFORE, in Count I, Plaintiffs pray judgment against Defendant as follows: a declaration that the procedural requirements for administrative relief contained in Defendant's Bill No. 111-98 and in the Development Regulations are unconstitutional, invalid, and unenforceable under the Fifth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983; a declaration that exhaustion of state administrative and judicial remedies is not required and is futile; an award in an amount in excess of $5,000,000 (according to proof) for damage to and devaluation of the Property; an award of reasonable attorneys' fees and the costs of experts and consultants, pursuant to 42 U.S.C. §§ 1983 and 1988 and

for Plaintiffs' costs and expenses herein expended and incurred; and for such other and further relief as the Court deems just and proper.

COUNT II

Inverse Condemnation – Taking (Facial)

48. Plaintiffs incorporate and adopt by reference the allegations in paragraphs 1 through 47 of this Complaint as though fully set forth in this Count II.

49. At all times material hereto, Defendant acted toward Plaintiffs under color of the statutes, laws, County Code, ordinances, customs and usage of the State of Maryland and Baltimore County. The actions of Defendant as set forth above executed the official policy of Defendant as made by its lawmakers, or are the acts of its officials whose acts or edicts may fairly be said to represent the official policy of Defendant.

50. Defendant acted in bad faith by adopting legislation (i.e. Bill No. 111-98) in response to and retaliation for Plaintiffs' application for the proposed development of their Property. Such a bad faith, selective and retaliatory response, on its face, represents an invalid public purpose and fails to advance a legitimate state interest. As established under the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983, where there is no legitimate public purpose or use, or where no legitimate public or state interest is advanced, the private property of Plaintiffs is unconstitutionally taken.

51. Plaintiffs have interests in property which include vested rights to the land, floor area ratio and airspace as set forth in the Baltimore County Code

regulations for the maximum building "height-tent" or "building height" and FAR designated under the zoning regulations for the BM district.

52. Plaintiffs' vested and grandfathered interests in the Property located in the BM zone extend significantly beyond the 35-foot height restriction and 0.5 FAR established pursuant to bill No. 111-98.

53. Defendant's actions in adopting Bill No. 111-98 are inconsistent with the police power authority granted to Baltimore County because Bill No. 111-98, on its face, fails to advance a legitimate public purpose goal or state interest, and results in a taking in violation of the taking and just compensation provisions of the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

54. Bill No. 111-98, on its face, results in the taking of the title of Plaintiffs' property interests in the form of avigation or airspace easements. Such a taking of the title of property interests from Plaintiffs without just compensation is a violation of the takings and just compensation provisions of the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

55. By committing each of the aforesaid acts, Defendant intended to prohibit the use of the Property and thereby intended to cause and did cause a taking of the title and property interests in violation of the Fifth and Fourteen [sic] Amendments to the United States Constitution and 42 U.S.C. § 1983, and knew or reasonably should have known that its actions as set forth above would and did violate Plaintiffs' federal constitutional rights. All of said acts were clearly irrational, arbitrary, capricious, unreasonable and wholly unrelated to any legitimate governmental or state interest.

56. As a direct and proximate result of the actions of Defendant as set forth above, Plaintiffs have been injured and damaged in excess of $5,000,000 plus interest, loss of profits and appreciation, and have incurred and will incur attorneys' fees and other expenses which they are entitled to recover.

WHEREFORE, in Count II, Plaintiffs pray judgment against Defendant as follows: a declaration that Bill No. 111-98, on its face, results in (a) a regulatory taking and inverse condemnation which fails to advance a legitimate state interest or public purpose; and (b) a regulatory taking and inverse condemnation of Plaintiffs' title and property interests in their exclusive protected air space and floor area; an award for the reasonable and beneficial market value of Plaintiff's Property had a regulatory taking and inverse condemnation not taken place; just compensation in an amount in excess of $5,000,000 (according to proof) for damage to and compensation for the devaluation of the Property; an award for the loss of use of Plaintiffs' Property together with interest, loss of appreciation and profits; an award of reasonable attorneys' fees and the costs of experts and consultants, pursuant to 42 U.S.C. §§ 1983 and 1988, and costs and expenses herein expended and incurred; and for such other and further relief as the Court deems just and proper.

COUNT III

Inverse Condemnation – Taking
(As Applied)

57. Plaintiffs incorporate and adopt by reference the allegations in paragraphs 1 through 56 of this Complaint as though fully set forth in this Count III.

58. The cause of action set forth in this count is ripe for adjudication. Plaintiffs have exhausted all available state administrative remedies by submitting three separate applications for administrative relief, all of which have been denied, are final and for which no further administrative appeal is available. First, on June 10, 1998, Plaintiffs requested an exemption from the PDM, through the DRC, under Section 26-171(b)(9) of the Baltimore County Code, for their proposed development. This requested exemption resulted in the retaliatory adoption of Bill No. 111-98. Second, Plaintiffs requested from the Planning Board of Baltimore County an expedited reclassification of the zoning on Plaintiffs' Property from the BM zone to OR-2 zone which would have been outside of Bill No. 111-98 and would have authorized the height and floor area ratio standards sufficient to allow for development of Plaintiffs' proposed project. Such expedited reclassification was denied on March 18, 1999. Third, Plaintiffs requested DRC consideration of an amended Site Plan under the exemption provided in Section 2 of Bill No. 111-98 for proposed redevelopment of improvements existing on or before October 5, 1998, which are to occur entirely within the footprint of the existing improvements, which have a square footage,

per story, less than or equal to the square footage, per story, of the existing improvements, and which do not require a public works agreement. Such request was denied on May 10, 1999 by the DRC. In addition, Plaintiffs' have initiated two mandamus counts in the Complaint and action filed in the Circuit Court of Baltimore County, Maryland. Plaintiffs have also filed on or about January 27, 1999 a fourth administrative remedy, a special hearing under Bill No. 111-98, which has been vigorously pursued but is not a viable process or remedy because it involves an unjustified delayed process involving a Hearing Officer Hearing and an appeal *de novo* to the board of Appeals, all of which will require in excess of two years and constitutes an abnormal delay. The special hearing under the bill creates futility for Plaintiffs in pursuing available administrative remedies.

59. Prior to the adoption of Bill No. 111-98, Plaintiffs had the right to proceed with a commercial development venture pursuant to a legal non-discretionary exemption from Division 2 of the Development Regulations, pursuant to their established claim of entitlement and vested property interest.

60. The Defendant, through its application of Bill No. 111-98, to Plaintiffs' Property and through its denials of all applications brought by Plaintiffs for development of the Property and for administrative relief from the provisions of Bill No. 111-98, has unlawfully and unconstitutionally taken Plaintiffs' property interests through regulatory taking and inverse condemnation, as follows: (a) the air rights and floor area ratio to Plaintiffs' Property, which

constitutes a permanent physical or title take; and (b) an economic taking through deprivation of all or substantially all of the economic use and/or value of Plaintiffs' Property taken in its entirety.

61. That by virtue of the allegations in the paragraphs set forth above, Defendant has violated the taking and just compensation provisions of the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

WHEREFORE, in Count III, Plaintiffs pray judgment against Defendant as follows: a declaration that Defendants have taken Plaintiffs' Property through a physical, title and economic regulatory taking and inverse condemnation in violation of the taking and compensation clause of the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983; an award for the reasonable and beneficial market value of Plaintiffs' Property had regulatory taking or inverse condemnation not occurred; just compensation in an amount in excess of $5,000,000 (according to proof) for damage to and devaluation of the Property; an award for the loss of use of Plaintiffs' Property together with interest, loss of appreciation and profits; an award of reasonable attorneys' fees and the costs of experts and consultants, pursuant to 42 U.S.C. §§ 1983 and 1988, and for Plaintiffs' costs and expenses herein expended and incurred; and for such other and further relief as the Court deems just and proper under the circumstances.

COUNT IV

Equal Protection
(Facial)

62. Plaintiffs incorporate and adopt by reference the allegations in paragraphs 1 through 61 of this Complaint as though fully set forth in this Count IV.

63. On its face, Bill No. 111-98 randomly, irrationally, unreasonably and selectively applies height and area restrictions to BM, BL and BR zoned properties, including Plaintiffs' Property, does not apply to all similarly-situated properties which actually have the potential to adversely affect RC zones by harming agricultural activities, natural resources or planned land use patterns, and thereby represents a legislative reclassification which is not rationally or reasonably related to a legitimate public purpose, does not have a fair and substantial relation to the object of the legislation, results in disparate treatment of similarly situated properties, and otherwise illegally discriminates against Plaintiffs and all others in Plaintiffs' circumstances.

64. Defendants' failure through Bill No. 111-98 to regulate all similarly situated uses, structures and zones represents bad faith, improper purpose and intent to deprive property rights by selectively retaliating and harming BL, BM and BR zoned properties, while not affecting similarly situation office and industrial zoned property from building in excess of the height and floor area restrictions of Bill No. 111-98 within 750 feet of RZ zones, improperly draws regulatory

classifications and violates the equal protection provisions of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

WHEREFORE, in Count IV, Plaintiffs pray judgment against Defendant as follows: an award in an amount in excess of $5,000,000 (according to proof) for damage to and devaluation of the Property; an award of reasonable attorneys' fees and the costs of experts and consultants, pursuant to 42 U.S.C. §§ 1983 and 1988, and for Plaintiffs' costs and expenses herein expended and incurred; a declaration that Defendants' Bill No. 111-98 is unconstitutional, invalid and unenforceable, pursuant to the equal protection provision of the Fourteenth amendment to the United States Constitution and 42 U.S.C. § 1983; an injunction to permanently prohibit and enjoin Defendant from enforcing Bill No. 111-98; and for such other and further relief as the Court deems just and proper.

COUNT V

Equal Protection (As Applied)

65. Plaintiffs incorporate and adopt by reference the allegations in paragraphs I through 64 of this Complaint as though fully set forth in this Count V.

66. On its face, Bill No. 111-98 randomly, irrationally, unreasonably and selectively applies height and area restrictions to BM, BL and BR zoned properties, including Plaintiffs' Property, does not apply to all similarly-situated properties which actually have the potential to adversely affect RC zones by harming agricultural activities, natural resources or planned

land use patterns, and thereby represents a legislative reclassification which is not rationally or reasonably related to a legitimate public purpose, does not have a fair and substantial relation to the object of legislation, results in disparate treatment of similarly situated properties, including office and industrial zoned properties which lie within 750 feet of RC zones but are exempt from the height and floor area ratio restrictions of Bill No. 111-98, and otherwise illegally discriminates against Plaintiffs.

67. As applied to Plaintiffs' Property, Bill No. 111-98 (and its irrational legislative classification) singles out two properties in the County and thereby constitutes random, irrational, unreasonable and selective legislation wherein Defendant effectively regulated the *ownership* and not the use of Plaintiffs' Property – an unconstitutional consideration for land use and planning regulation, and an exercise of police power with bad faith and improper purpose to harm Plaintiffs' property interest.

68. As applied to Plaintiffs' Property, Bill No. 111-98 does not promote or protect agricultural activities or conservation of natural resources on RC-zoned lands near or adjacent to BL, BM or BR properties, including Plaintiffs' Property, because it fails to regulate those properties in non-BL, -BM or -BR zones which, by virtue of uses as of right, allow for the construction of buildings or structures closer to RC zones than Plaintiffs' Property and which would, under the findings of Bill No. 111-98, have more effect upon agricultural activities, natural resources and conservation of the RC zones.

69. Bill No. 111-98's selective application of height and area restrictions to Plaintiffs' BM-zoned Property which is within 750 feet of RC-zoned lands, and its inapplicability to other similarly-situated properties of office and industrial zoned properties which lie within 750 feet of RC zones but are exempt from the height and floor area ratio restrictions of Bill No. 111-98, represents a legislative classification which is not rationally or reasonably related to a legitimate public purpose, does not have a fair and substantial relation to the object of the legislation, results in disparate treatment of similarly situated properties, and otherwise illegally discriminates against Plaintiffs.

70. The application of Bill No. 111-98 to Plaintiffs' Property constitutes an as applied denial of equal protection of the law under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

WHEREFORE, in Count V, Plaintiffs pray judgment against Defendant as follows: an award in an amount in excess of $5,000,000 (according to proof) for damage to and devaluation of the Property; an award of reasonable attorneys' fees and the costs of experts and consultants, pursuant to 42 U.S.C. §§ 1983 and 1988, and for Plaintiffs' costs and expenses herein expended and incurred; a declaration that Defendants' Bill No. 111-98 is unconstitutional, invalid and unenforceable under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983; an injunction to permanently prohibit and enjoin Defendant from enforcing Bill No. 111-98; and for such other and further relief as the Court deems just and proper.

COUNT VI

Substantive Due Process
(Facial)

71. Plaintiffs incorporate and adopt by reference the allegations in paragraphs 1 through 70 of this Complaint as though fully set forth in this Count VI.

72. Bill No. 111-98, on its face and as adopted by Defendant, was adopted in bad faith and without requisite notice and public hearing; was not based on any studies, hearings, public process, policies or plans; is inconsistent with the Master Plan of Baltimore County, the draft proposed Master Plan of Baltimore County, the "Smart Growth" legislation of the State of Maryland, violates the anti-sprawl, transportation congestion, inconsistency with metropolitan planning and degradation of air quality provisions of the Transportation Equity Act for the 21st Century, 23 U.S.C. § 101(a), *et seq.*, Public Law 105-78 (1998) and Federal Clean Air Act, 42 U.S.C. § 7401-7642 (1988), as amended; and, in all of those respects, it is arbitrary, capricious, unreasonable, irrational, not supported by substantial and competent evidence, without foundation or rational basis and wholly unrelated to any legitimate governmental interest, *ultra vires;* does not advance a legitimate state interest because it fails to advance any rational interest, nor is it a reasonable or rational way of effectuating the purpose of protecting agricultural activities and natural resources in the Resource Conservation zone; violates the regional general welfare of the

State of Maryland, Baltimore County and the Baltimore County region in promoting urban sprawl and discouraging economic development to occur in planned nodes and centers, and promotes the increase of air quality degradation, traffic congestion and energy consumption; destroys Plaintiffs' existing vested property rights; deprives Plaintiffs and all other property owners situated in the BM, BL or BR zones within 750 feet of an RC zone of their right to federal legislative substantive due process protection secured by the Fifth and Fourteenth Amendment to the United States Constitution and and [sic] 42 U.S.C. § 1983, and in violation of the provisions of the Transportation Equity Act for the 21st Century, 23 U.S.C. § 101(a), *et seq.*, Public Law 105-78 (1998) and Federal Clean Air Act, 42 U.S.C. § 7401-7642 (1988), as amended.

73. The adoption of Bill No. 111-98 was intended to and actually does arbitrarily, capriciously, irrationally and unlawfully prohibit the use of Plaintiffs' Property and was intended to cause and did cause a deprivation of rights secured by the fifth and fourteenth amendments to the United States Constitution, and violate the provisions of the Transportation Equity Act for the 21st Century, 23 U.S.C. § 101(a), *et seq.* (Public Law 105-78) and the Federal Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988), as amended, and Defendant knew or reasonably should have known that its actions as set forth above would and did violate Plaintiffs' rights as set forth above.

74. As a direct and proximate result of the actions of Defendants, as set forth above, Plaintiffs have been

unlawfully and unconstitutionally precluded from economically viable and reasonable uses of their Property, have been injured and damaged in an amount in excess of $5,000,000, and have incurred and will incur attorneys' fees, consultants and expert fees, as well as other expenses which it is entitled to recover pursuant to 42 U.S.C. §§ 1983 and 1988.

WHEREFORE, in Count VI, Plaintiffs pray judgment against Defendant as follows: an award in an amount in excess of $5,000,000 (according to proof) for damage to and devaluation of the Property; an award of reasonable attorneys' fees and the costs of experts and consultants, pursuant to 42 U.S.C. §§ 1983 and 1988, and for Plaintiffs' costs and expenses herein expended and incurred; a declaration that Defendants' Bill No. 111-98 is unconstitutional, invalid and unenforceable under the federal Fifth and Fourteenth Amendments to the United States Constitution, the Transportation Equity Act for the 21st Century, 23 U.S.C. § 101(a), *et seg.* (Public Law 105-78) and the Federal Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988), as amended; an injunction to permanently prohibit and enjoin Defendant from enforcing Bill No. 111-98; and for such other and further relief as the Court deems just and proper in the circumstances.

COUNT VII

Substantive Due Process (As Applied)

75. Plaintiffs incorporate and adopt by reference the allegations in paragraphs 1 through 74 of this Complaint as though fully set forth in this Count VII.

76. The cause of action set forth in this Count is ripe. On its face, Bill No. 111-98 randomly, irrationally, unreasonably and selectively applies height and area restrictions to BM, BL and BR zoned properties, including Plaintiffs' Property, does not apply to all similarly-situated properties which actually have the potential to adversely affect RC zones by harming agricultural activities, natural resources or planned land use patterns, and thereby represents a legislative reclassification which is not rationally or reasonably related to a legitimate public purpose, does not have a fair and substantial relation to the object of legislation, results in disparate treatment of similarly situated properties, and otherwise illegally discriminates against Plaintiffs and all others in Plaintiffs' circumstances.

77. As applied to Plaintiffs' Property, Bill No. 111-98 is irrational, serves no legitimate public purpose and, even if a legitimate public purpose were deemed to exist, the mechanisms used to achieve that purpose are not reasonably related to, and do not achieve, that end.

78. Bill No. 111-98, as applied to Plaintiffs' Property, was adopted in bad faith, in retaliation for the request for exemption from the community input meeting and hearing officers hearing requirements of Division 2 of the Development Regulations as alleged in paragraph 32, without requisite notice and public hearing, was not based on any studies, hearings, public process, policies or plans, is inconsistent with the Master Plan of Baltimore County, the draft proposed Master Plan of Baltimore County and the

"Smart Growth" legislation of the State of Maryland and the Transportation Equity Act for the 21st Century, 23 U.S.C. § 101(a), *et seq.* (Public Law 105-78) and the Federal Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988), as amended, in all of those respects is arbitrary, capricious, unreasonable, irrational, not supported by substantial and competent evidence, is without foundation or rational basis and wholly unrelated to any legitimate governmental interest, *ultra vires*, does not advance a legitimate state interest because it fails to advance any rational interest, nor is a reasonable or rational way of effectuating the purpose of protecting agricultural activities and natural resources in the Resource Conservation zone, violates the regional general welfare of the State of Maryland, Baltimore County and the Baltimore County region in promoting urban sprawl and discouraging economic development to occur in planned nodes and centers, and promotes the increase of air quality degradation, traffic congestion and energy consumption; destroys Plaintiffs' existing vested property rights, and deprives Plaintiffs and all other property owners situated in the BM, BL or BR zones within 750 feet of an RC zone of their right to substantive due process protection secured by the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983, and in violation of the provisions of the Transportation Equity Act for the 21st Century, 23 U.S.C. § 101(a), *et seq.* (Public Law 105-78) and the Federal Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988), as amended.

79. In its application of Bill No. 111-98 to Plaintiffs' Property, Defendant intended to and actually does prohibit the use of the Property and thereby intended to cause and did cause a deprivation of substantive due process secured by the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983, and in violation of the provisions of the Transportation Equity Act for the 21st Century, 23 U.S.C. § 101(a), *et seq.* (Public Law 105-78) and the Federal Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988), as amended, and knew or reasonably should have known that their actions as set forth above, and their denial of Plaintiffs' request for exemption from the requirements of Bill 111-98, as alleged in paragraph 40, would and did violate Plaintiffs' rights secured by the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983, and in violation of the provisions of the Transportation Equity Act for the 21st Century, 23 U.S.C. § 101(a), *et seq.* (Public Law 105-78) and the Federal Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988), as amended.

80. As a direct and proximate result of the actions of Defendant as set forth above, Plaintiffs have been unconstitutionally precluded from economically viable and reasonable uses of their Property, have been injured and damaged in an amount in excess of $5,000,000, and have incurred and will incur attorneys' fees, consultants and expert fees pursuant to 42 U.S.C. §§ 1983 and 1988, as well as other expenses which it is entitled to recover.

WHEREFORE, in Count XII, Plaintiffs pray judgment against Defendant as follows: an award in an amount in excess of $5,000,000 (according to proof) for damage to and devaluation of the Property; an award of reasonable attorneys' fees and the costs of experts and consultants, and for Plaintiffs' costs and expenses herein expended and incurred; a declaration that Defendant's Bill No. 111-98 is unconstitutional, invalid and unenforceable under the rights secured by the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983, and in violation of the provisions of the Transportation Equity Act for the 21st Century, 23 U.S.C. § 101(a), *et seq.* (Public Law 105-78) and the Federal Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988), as amended; and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

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Amendment V

Article [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

Amendment XIV

Article XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President

and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,[15] and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. the validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or

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[15] See amendment XIX and section 1 of amendment XXVI.

any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

PROPOSAL AND RATIFICATION

The fourteenth amendment to the Constitution of the United States was proposed to the legislatures of the several States by the Thirty-ninth Congress, on the 13th of June, 1866. It was declared, in a certificate of the Secretary of State dated July 28, 1868 to have been ratified by the legislatures of 28 of the 37 States. The dates of ratification were: Connecticut, June 25, 1866; New Hampshire, July 6, 1866; Tennessee, July 19, 1866; New Jersey, September 11, 1866 (subsequently the legislature rescinded its ratification, and on March 24, 1868, readopted its resolution of rescission over the Governor's veto, and on Nov. 12, 1980, expressed support for the amendment); Oregon, September 19, 1866 (and rescinded its ratification on October 15, 1868); Vermont, October 30, 1866; Ohio, January 4, 1867 (and rescinded its ratification on January 15, 1868); New York, January 10, 1867; Kansas, January 11, 1867; Illinois, January 15, 1867; West Virginia, January 16, 1867; Michigan, January 16, 1867; Minnesota, January 16, 1867; Maine, January 19, 1867; Nevada, January 22, 1867; Indiana, January 23, 1867; Missouri, January 25, 1867; Rhode Island, February 7, 1867; Wisconsin, February 7, 1867; Pennsylvania, February 12, 1867; Massachusetts, March 20, 1867; Nebraska, June 15, 1867; Iowa,

March 16, 1868; Arkansas, April 6, 1868; Florida, June 9, 1868; North Carolina, July 4, 1868 (after having rejected it on December 14, 1866); Louisiana, July 9, 1868 (after having rejected it on February 6, 1867); South Carolina, July 9, 1868 (after having rejected it on December 20, 1866).

Ratification was completed on July 9, 1868.

The amendment was subsequently ratified by Alabama, July 13, 1868; Georgia, July 21, 1868 (after having rejected it on November 9, 1866); Virginia, October 8, 1869 (after having rejected it on January 9, 1867); Mississippi, January 17, 1870; Texas, February 18, 1870 (after having rejected it on October 27, 1866); Delaware, February 12, 1901 (after having rejected it on February 8, 1867); Maryland, April 4, 1959 (after having rejected it on March 23, 1867); California, May 6, 1959; Kentucky, March 18, 1976 (after having rejected it on January 8, 1867).

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28 U.S.C. § 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under section 1253 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judgment of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge

or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

(g) The time for application for a writ of certiorari to review a decision of the United States Court of Appeals for the Armed Forces shall be as prescribed by rules of the Supreme Court.

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28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

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28 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of

Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

F.R.Civ.P. Rule 12. Defenses and Objections – When and How Presented – By Pleading or Motion – Motion for Judgment on the Pleadings

(1) WHEN PRESENTED.

(a) Unless a different time is prescribed in a statute of the United States, a defendant shall serve an answer

(A) within 20 days after being served with the summons and complaint, or

(B) If service of the summons has been timely waived on request under Rule 4(d), within 60 days after the date when the request for waiver was sent, or within 90 days after that date if the defendant was addressed outside any judicial district of the United States.

(2) A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after being served. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs.

(3) The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the

service upon the United States attorney of the pleading in which the claim is asserted.

(4) Unless a different time is fixed by court order, the service of a motion permitted under this rule alters these periods of time as follows:

> (A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; or
>
> (B) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or

fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) MOTION FOR JUDGMENT ON THE PLEADINGS. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) PRELIMINARY HEARINGS. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) MOTION FOR MORE DEFINITE STATEMENT. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a

responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion To Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a

motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Feb 28, 2001

Supreme Court, U.S.
FILED
FEB 28 2001
OFFICE OF THE CLERK

No. 00-1227

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

GREENSPRING RACQUET CLUB, INC., *et al*,

Petitioners,

v.

BALTIMORE COUNTY, MARYLAND, *et al*,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

Petitioners' statement regarding the opinions issued below is incomplete. The citation for the unreported Fourth Circuit case is 232 F.3d 887 (4th Cir. 2000). As to the district court proceedings, petitioners failed to mention that the district court issued another opinion, finding that Petitioners' lawsuit was frivolous and awarding Respondent attorneys' fees pursuant to 42 U.S.C. § 1988(b). *See Greenspring Racquet Club, Inc., v. Baltimore County*, 77 F.Supp. 2d 699 (D. Md. 1999). The Fourth Circuit affirmed the district court's holding on frivolity ("amply supported by the record"). *See* App. 21.

MISSTATEMENT OF FACTS

Pursuant to Rule 15.2, Respondents are required to address misstatements of fact contained in the Petition. There are ten worth mentioning.

1. "Petitioners ... have battled Baltimore County, Maryland for several years for the right to redevelop a 5.5 acre parcel of land...." *See* Petition at 2. This statement is quite false but it represents Petitioners' attempt to make this case a first cousin to *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687 (1999).[1] On June 10, 1998, Petitioners began their effort to redevelop the property. App. 94. On October 5, 1998, the County passed the legislation which is the subject of this suit. App. 80. Baltimore County submits that four months is not "several years."

2. In the very same sentence as their first misstatement, Petitioners label the area at issue as a "major commercial office center." *See* Petitioner at 2. In the area of regulatory takings jurisprudence, context is important. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct 2646, 2659, 57 L.Ed 631 (1978). The property at issue is surrounded by residential and agricultural properties.

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[1]But *Del Monte* attracted this Court's attention because over the course of 5 years the City of Monterey erected various barriers to development, only to be satisfied by the developer who then faced newly-erected conditions, all plausibly designed to thwart the developer. 526 U.S. at 706.

3. Petitioners also contend that the subject bill was "designed to single out Greenspring's property." *See* Petition at 2-3. Yet, the record reflects that the bill applies to over 150 other properties. App. at 30 n.3.

4. Petitioners further assert that the "district court found and the Fourth Circuit affirmed that, as a matter of law, this restrictive ordinance although enacted in bad faith retaliation to Greenspring's redevelopment initiative, substantially advanced a legitimate state interest...". *See* Petition at 3. Neither the district court nor the Fourth Circuit ever found that Bill 111-98 was "enacted in bad faith retaliation". In fact, both explicitly rejected such an idea. App. 16 & 42.

5. Petitioners next assert that "[i]n 1998 Greenspring undertook...[a] 'Business Major' ('BM') zoning classification which permits, as a matter of right, office buildings as high as 100 feet...". *See* Petition at 3. As recognized by the lower courts, a vested right to build under Maryland law does not exist until a property owner has a building permit in hand and has started construction -- colloquially known as the "shovel-in-the-ground" rule. *Colwell v. Howard County,* 31 Md. App. 8, 15, 354 A.2d 210 (1976).

6. Petitioners also incorrectly contend that "[a]lthough Greenspring demonstrated compliance with all the requirements for this exemption, the request was denied." *See* Petition at 4.[2] Petitioners' statement is incorrect for it implies

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[2]The exemption referred to here is found in the Baltimore County Code §26-171(b)(9). The exemption obviates the need for the de-

that if they met certain conditions, then they would get the exemption. Yet again they have no such "right." *City of Annapolis v. Waterman*, 357 Md. 484, 532 n.4 (2000) ("if planning boards had no alternative but to rubber-stamp their approval on every subdivision plat which conformed with the zoning ordinance, there would be little or no reason for their existence").

7. Petitioners further contend that "[t]he ordinance destroyed Greenspring's office development capacity...." *See* Petition at 4. But, under the challenged law, Petitioners could still have built an office building 35 feet high.

8. Petitioners also assert that "[t]he impact of the ordinance on Greenspring's property was to reduce the property's use and value by 95.6%." *See* Petition at 4 fn.1. This statement is premised on the notion that before enactment of Bill 111-98, petitioners had a right to build a 100 foot high building. Under Maryland law, they had no right, only a unilateral expectation. *City of Annapolis v. Waterman*, 357

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veloper to go through a community input meeting, the process of which is described in Baltimore County Code §26-202(h), and a hearing officer's hearing (meaning the Baltimore County Zoning Commissioner §26-168(w)). The "virtue" of the exemption is that it keeps the public citizenry, who might be affected by the development, completely sequestered from the process. The developer may obtain the exemption if the Director of Permits and Development Management deems the development a "minor development" as defined in §26-168(cc). This is a discretionary call under §26-239(b).

Md. 484, 745 A.2d 1000 (2000) ("In Maryland, it is established that in order to obtain a 'vested right' in the zoning ordinance prohibiting or limiting that use, the owner must" have a permit in hand and have begun construction).

9. The entire and only full paragraph on page 5 of the Petition is also irrelevant. It has nothing to do with whether the Bill is unconstitutional, which was the aim in all seven counts of Petitioners' operative complaint.

10. Finally, Petitioners contend that "...Greenspring was denied the opportunity to litigate its federal causes of action." *See* Petition at 11. Petitioners *did* litigate their federal causes of action and, despite all principles of *res judicata*, are litigating them all over against the same defendant in state court, this time under the analogous provisions of the Maryland Declaration of Rights.

REASONS FOR DENYING THE WRIT

I. This Is Not The Case To Review The Meaning Of The Phrase "Substantially Advance Legitimate State Interests"

Petitioners' arguments focus on the first prong of evaluating regulatory takings declared in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). Under that test, a general zoning law can violate the Fifth Amendment if it "does not substantially advance legitimate state interests." *Id.* This case involves a zoning law that sets height restrictions – restrictions that have been upheld for nearly a century as advancing legi-

timate governmental interests. Of all the important issues competing for this Court's time, this case is ill-suited for inclusion on its docket. There are three reasons.

First, this case involves the legislative passage of a county-wide zoning regulation. This Court has been deferential to such laws for many years. *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887) ("A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit"); *Hodel v. Irving*, 481 U.S. 704, 713 (1987) ("Government has considerable latitude in regulating property rights in ways that may adversely affect the owners.").

Second, the Baltimore County legislation was an attempt, in the words of the Fourth Circuit, at "controlling dense development in areas located near rural conservation zones." App. 13. Whatever the existing debate is in some still remote quarters of takings litigation about what constitutes a legitimate state interest, the aim (or the ends) of this very type of regulation is no longer in dispute. This Court has deemed such purposes to be a legitimate municipal goal. *See e.g.*, *Berman v. Parker*, 348 U.S. 26, 33 (1954) (observing, in a zoning context, that it is "within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled"). Petitioners' stupid staff argument, *see* Petition at 17, is unavailing as governments are allowed to identify their objectives for passing a bill. *City of*

New Orleans v. Dukes, 427 U.S. 297, 304 (1976). Usually, it is obvious. *Id.* If this Court issues the writ it should be prepared to overrule cases like *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), where this Court relied on statements of legislators who sponsored the bill in upholding it. *Id.* at 465, 467-68.

Third, whatever the existing debate about what "substantially advances" means, Baltimore County's belief that regulating by height would deter potentially deleterious effects on traffic, road, sewers and water use satisfies the means to the end. Lower buildings means fewer people, which means fewer cars, less water use and less traffic. Thus, the "means" can be satisfied by judicial notice. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1986); *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 628 (1995). *See also Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 62 (1973) ("The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional"); *Id.* at 63 ("Mr. Justice Cardoza said that all laws in Western civilization are 'guided by a robust common sense'").

It is for these reasons that granting the writ in this case would be senseless.[3] The Court would be addressing an issue that has been settled for decades. *Pennell v. City of San*

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[3]If the Court believes the meaning of the substantially advance test requires clarification, the case of *Cayetano v. Chevron USA, Inc.*, No. 00-1198, is a far better vehicle than this one.

Jose, 485 U.S. 5, 20 (1988) (Scalia, J., dissenting) ("Traditional land-use regulation (short of that which totally destroys the economic value of property) does not violate this principle because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy .... Thus, the common zoning regulations requiring subdividers to observe lot-size and set-back restrictions, and to dedicate certain areas to public streets, are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion."); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 418 (1922) (Brandies, J., dissenting) ("Every restriction upon the height of building might be secured through acquiring by eminent domain the right of each owner to build above the limiting height; but it is settled that the state need not resort to that power.").[4]

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[4]Most of Petitioners' argument on this issue attacks the breadth of the Fourth Circuit's holding. *See* Petition at 21. They also attach great significance to the scope of that court's holding on their *Agins* issue. *Id.* at 8 & 16. The Court can safely ignore this basis for issuing the writ because its office is to review judgments not words in opinions. *See, e.g., Ohio v. Robinette*, 519 U.S. 33, 51 n.9 (1996).

II. Petitioner's Equal Protection Claim and *Village Willowbrook v. Olech* Are as Different as January and June.

Petitioners urge the Court to issue the writ to correct the Fourth Circuit's misapplication of this Court's recent decision in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). According to them, "[t]he Court should take this opportunity to define and clarify the ramifications of the *Olech* decision....". *See* Petition at 22. The notion that this case is a good opportunity to explore *Olech* is unfounded.

First, the decision-maker for the government in *Olech* was an unelected official from the executive branch. This case involves a duly-elected county council, a legislative body. This distinction is crucial. *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) ("criteria to identify what is totally arbitrary *differ depending* on whether it is legislation or a specific act of a government officer that is at issue") (emphasis added).

Second, the *Olech* Court authorized a "class of one" in equal protection litigation. But, the Court did not reach the lower court's theory of subjective ill will that Petitioners now wish to "define and clarify." 528 U.S. at 565.

Third, Petitioners fail *Olech's* most basic hurdle. The regulation limiting height has a rational basis. Baltimore County has already explained why: *viz.*, limiting the size of buildings limits the number of its occupants which limits the number of cars and the amount of water consumed. The

Court has found that regulations of this type command assent that they are legitimate governmental objectives. *Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974); *Euclid v. Ambler Realty*, 272 U.S. 365 (1926). Moreover, the law here does not involve a fundamental right or a suspect class. Therefore the regulation is presumed constitutional. This Court has long recognized that governments are given wide latitude -- their distinctions need not have "mathematical exactitude" – and they can take "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955). If the question is debatable, the legislation is valid even if plaintiffs can show the legislature was mistaken. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). Unless these principles are now viewed by this Court as suspect, Petitioner's equal protection claim is empty. This Court often has held that if litigants are disenchanted with certain laws, then they should repair to the legislature to seek a change in the law and not run into court. *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963).

III. In Issuing A Writ, This Court Should At Least Require Petitioner To Be Injured By The "*Williamson* Trap"

Petitioners' plea that this Court review the alleged confusion purportedly engendered by the *Williamson County* case is unfounded. Land use plaintiffs trapped by *Williamson County* invariably contend that they sustained some type of injury. Typically, it is claimed that a plaintiff's attempt to

satisfy the ripeness requirement under *Williamson County* (by bringing an inverse condemnation claim in state court) subsequently deprives them of their ability to litigate their federal claims in federal court based on principles of *res judicata*. Whether this is actually occurring in the federal courts is an academic point in the context of this case.

Petitioners sued in federal court and, unlike litigants trapped by *Williamson*, *had their claims adjudicated in federal court*. They even had their as-applied takings claim adjudicated. The Fourth Circuit reversed the district court on this claim alone, requiring it to adjudicate the as-applied takings claim after Petitioners exhaust in state court.[5]

The *Williamson* trap aggrieves some developers because they never get their claims adjudicated in federal court. In this case, however, the Petitioners did. Indeed, it was the district court's *disposition* of their federal claims that troubled Petitioners, not that their federal claims had not been heard because they were. As such, they obviously were never caught in this purported trap.

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5 In doing so, the court rejected respondent's argument that exhaustion was futile.

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CONCLUSION

This Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Supreme Court, U.S.
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No. 00-1227

In The

Supreme Court of the United States

GREENSPRING RACQUET CLUB, INC.; WILLIAM HIRSHFELD; and LORETTA HIRSHFELD,

Petitioners,

v.

BALTIMORE COUNTY, MARYLAND, a body corporate and Politic,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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MISCELLANEOUS:

Transcript of Oral Argument, *City of Monterey v. Del Monte Dunes at Monterey*..... 1

REPLY TO RESPONDENT'S PERCEIVED MISSTATEMENT OF FACTS MADE IN THE PETITION

Rule 15.2 admonishes counsel opposing a Petition for Writ of Certiorari to "point out in the brief in opposition, and not later, any perceived misstatement made in the petition." The ten misstatements enumerated by Respondents (Opposition, pp. 2-5) are total misapprehensions and have not properly been drawn from the pleadings.

Respondents claim Petitioners' statement that their redevelopment efforts have lasted for several years is "quite false." (Opposition, p. 2). According to Respondents, Petitioners' redevelopment efforts began June 10, 1998 and ceased on October 5, 1998 with the retaliatory passage of Bill 111-98 ("the Ordinance"). (Opposition, p. 2). Respondents omit the multiple requests for relief after Bill 111-98 was adopted: (1) Petitioners' request for an intermediate category of rezoning to avoid the restrictions of the Ordinance (*MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351 (1986) (need to apply for intermediate relief); (2) a second application for the ministerial right to proceed to a building permit; (3) Petitioners' request for a "footprint exemption" under the terms of the Ordinance (*Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172, 188 (1985) (application for a "variance"); and (4) the present litigation. (App. 6). These multiple efforts to redevelop the subject property have clearly extended beyond October 1998 and continue to the present day which, as stated by Petitioners, is several years after their efforts began in June 1998. As emphatically pointed out by Justice Scalia stated in *City of Monterey v. Del Monte Dunes* at oral argument, five times is enough. Tr. of Oral Argument, p. 3.

Respondents also attempt to reestablish the record of the case. According to Respondents, "the record reflects that [Bill 111-98] applies to over 150 other properties." (Opposition, p. 3). In support of this proposition Respondents cite to the Memorandum Opinion of the District Court. The actual text of the opinion indicates that Respondents' contention is patently erroneous.

> Greenspring claims these restrictions cover only its site and one other. The County asserts that the Ordinance affects 150 sites. For the purposes of the motion [to dismiss], I assume that Greenspring's allegations are true."

(App. 30, n.3). Therefore, for purposes of this case, the Ordinance applies to Petitioners' property and one other property not 150 sites as claimed by Respondents.

Petitioners need not go any further in distinguishing the enumerated misstatements Respondents perceive to be contained within the Petition. What is clear is that Respondents choose to deny the fundamental principle underlying a motion to dismiss – that the allegations of the Complaint are deemed to be true for purposes of a Rule 12(b)(6) motion. The allegations of the Complaint have been fully and correctly set forth in the Petition and the Complaint is attached (App. 74-108) for the Court's own review.

REASONS FOR GRANTING THE WRIT

I. THE STANDARDS GOVERNING THE REQUIREMENT THAT A REGULATION SUBSTANTIALLY ADVANCE LEGITIMATE STATE INTERESTS IS AN IMPORTANT AND RECURRING QUESTION OF REGULATORY TAKINGS LAW THAT HAS NOT BEEN SETTLED BY THIS COURT

Paraphrasing Respondents' argument, the Constitutional requirement that land use regulations "substantially advance legitimate state interests," as pronounced in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) and repeatedly cited thereafter, is "ill-suited for inclusion on [this Court's] docket" and "granting the writ in this case would be senseless." (Opposition, 6-7).[1] Moreover, Respondents argue that even if this were an issue deserving the Court's attention a case recently decided by the Ninth Circuit would be a "far better vehicle" for resolving it than the instant case. (Opposition, 7 n.3). Respondents' argument indicates a fundamental misunderstanding of regulatory takings jurisprudence and illustrates a myopic demand for abdication to local land use regulation.

It is well established by this Court that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not *substantially advance*

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[1] The repeated use of belligerent expressions by opposing counsel exemplifies and mirrors the extraordinary hostility, animosity and retaliation effected by the County in singling out Petitioners for bad faith treatment.

legitimate state interests, or denies an owner economically viable use of his land." *Agins*, 447 U.S. at 260 (citations omitted) (emphasis supplied). *See also, San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 647 (1981); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985); *Keystone Bituminous Coal Ass'n v. De Benedictis*, 480 U.S. 470, 485 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-16 (1992); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 704 (1999). The two-pronged *Agins* test is a cornerstone of regulatory takings law. This Court, however, "has [never] provided a thorough explanation of the nature and applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions. . . . " *Del Monte Dunes*, 526 U.S. at 704. It is clearly ripe and appropriate for review based on the hostile and retaliatory actions deemed true in the record below.

The Fourth Circuit has interpreted this Court's "substantially advance" standard as nothing more than a superficial requirement satisfied any time "statements by local lawmakers set out legitimate reasons for imposing height and density restrictions on property in a particular class of zones. . . . " (App. 14). Naturally, Respondents advocate this unmitigated deference to property regulations, but this Court has not upheld such a total abdication of review in the past and should not allow it to stand in this case. *See, e.g., Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) ("The greatest weight is given to the judgment of the legislature, but it always is open to

interested parties to contend that the legislature has gone beyond its constitutional power."); *Nollan*, 483 U.S. at 841 ("We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination."); *Dolan*, 512 U.S. at 392 ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation. . . . ").

Unmitigated deference to local property regulations would contradict this Court's takings jurisprudence which repeatedly finds that takings analysis is dependent upon the particular facts and circumstances of the case. *See, Pennsylvania Coal Co.*, 260 U.S. at 413; *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) and *Del Monte Dunes*, 526 U.S. at 720 ("Almost from the inception of our regulatory takings doctrine, we have held that whether a regulation of property goes so far that 'there must be an exercise of eminent domain and compensation to sustain the act . . . depends upon the particular facts.' " (quoting *Pennsylvania Coal Co.*, 260 U.S. at 413)).[2]

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[2] *See also Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *San Diego Gas & Elec. Co.*, 450 U.S. at 649-50; *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419, 426 (1982); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 349 (1986); *Keystone Bituminous Coal Ass'n*, 480 U.S. at 474 and 495; *Hodel v. Irving*, 481 U.S. 704, 714 (1987); *Yee v. City of Escondido*, 503 U.S. at 522-23; *Lucas*, 505 U.S. at 1015; *Nollan*, 483 U.S. 825 (1987); *Dolan*, 512 U.S. 374 (1994).

"Pennsylvania Coal instructs courts to examine the operative provisions of a statute, not just its stated purpose, in assessing its true nature." *Keystone Bituminous Coal Ass'n*, 480 U.S. at 487 n.16. By summarily accepting the proffered legitimate reasons for adopting a land use ordinance and presuming, because it contains elemental Euclidean height and density restriction (even where oppressive) that it "quite obviously . . . substantially advance[s] a legitimate state interest" (App. 12-13) the Fourth Circuit, without any supporting public policy rationale to support its deviation, contradicts this Court's established regulatory takings jurisprudence.

The record, fairly pleaded, establishes that Bill 111-98 was the product of conspiracy between the County and certain adjacent and nearby property owners (App. 89, ¶ 44), was inconsistent with the County's adopted Master Plan and was adopted solely out of personal animus and retaliatory intent. (App. 83, ¶ 25; App. 101, ¶ 72; App. 104, ¶ 78). Petitioners do not contest that there is a legitimate state interest in protecting Resource Conservation Zones as they may appear. Rather, Petitioners claim the Ordinance adopted in the name of preserving Resource Conservation Zones did not substantially advance that avowed purpose. The Ordinance failed to substantially advance the protection of Resource Conservation Zones by permitting, without exception, the construction of buildings in office or manufacturing zones, even if immediately adjacent to Resource Conservation Zones, far in excess of the height and Floor Area.

II. IN DISMISSING GREENSPRING'S EQUAL PROTECTION COUNTS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED THE FOURTH CIRCUIT IGNORED THIS COURT'S PRECEDENT IN *VILLAGE OF WILLOWBROOK V. OLECH*

Respondents' Opposition misconstrues Petitioners' argument. Simply stated, *Village of Willowbrook v. Olech* held that allegations of "irrational and wholly arbitrary" action by a local government made by a "class of one . . . are sufficient to state a claim for relief under traditional equal protection analysis." 528 U.S. 562, 563 (2000). Petitioner has alleged in the instant case that "Bill No. 111-98 randomly, irrationally, unreasonably and selectively applies height and area restrictions to BM, BL and BR zone properties, including Plaintiffs' Property, [and] does not apply to all similarly-situated properties which actually have the potential to adversely affect RC zone . . . . " (App. 97, ¶ 63). In addition, Petitioners alleged the "extra factor [of] . . . 'vindictive action', 'illegitimate animus', or 'ill will' " which is necessary to distinguish the case from "the simple and common instance" of a zoning action that lacks a rational basis for intentional disparate treatment of landowners. *Olech*, 528 U.S. at 563. (App. 91, ¶ 50). Clearly the grounds for stating an Equal Protection claim upon which relief may be granted, as set forth in *Olech*, were met by Petitioners.

Instead of evaluating whether Petitioners' allegations stated a sufficient claim under the Equal Protection clause, the Fourth Circuit made a conclusory determination on the merits of the case and on that basis adjudged the allegations insufficient. The Fourth Circuit made the

illogical and unfounded conclusion that "[b]ecause the local zoning decision at issue in the instant case is not 'irrational and wholly arbitrary,' Greenspring's complaint is easily distinguished from the complaint at issue in *Olech*." (App. 17 n.4). This analysis is patently inconsistent with the Court's decision in *Olech* which decided the sufficiency of allegations not whether the governmental action actually was irrational and arbitrary.

The Court should take this opportunity to define and clarify the ramifications of the *Olech* decision and overturn the Fourth Circuit's judgement as being in clear conflict with that decision.

III. GREENSPRING IS A CASUALTY OF THE CONFLICT AND CONFUSION AMONG THE CIRCUIT COURTS ABOUT HOW TO PROCEDURALLY ACHIEVE THIS COURT'S *WILLIAMSON COUNTY* REQUIREMENT THAT PROPERTY OWNERS "RIPEN" THEIR CONSTITUTIONAL CLAIMS BY SEEKING RELIEF IN STATE COURT BEFORE PURSUING AN ACTION IN FEDERAL COURT

Recognizing the confusion among the Circuits and the lack of definitive guidance or affirmation from this Court as to the legitimacy of any procedure for satisfying the ripeness requirements of *Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), Petitioners (after exhausting all available administrative remedies) combined two precautionary steps in filing its court actions: (1) a state court action (seeking only Maryland constitutional and statutory remedies) reserving the federal claims pursuant to the instructions of the Fourth

Circuit in *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 (4th Cir. 1998) (praising the *Fields* and *Jennings* Reservation practice[3] and instructing *district courts* to advise takings litigants of their right to make such a reservation); and (2) a separate federal action in United States District Court (seeking only federal constitutional and legal remedies) reiterating the "Reservation" and simultaneously moving for a *stay* of "all proceedings . . . until the conclusion of the state court action" (App. 65) pursuant to the precedent of this Court in *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), and *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800 (1973).

Despite recognizing Petitioners' need to litigate in state court before subject matter jurisdiction is conferred upon the federal courts (Petition, pp. 26-27), and despite Petitioners' express Reservation and Motion to Stay (App. 62-71), the District Court erroneously heard Respondents' 12(b)(6) motion on the merits and dismissed all of Petitioners' claims with prejudice. The District Court did not have jurisdiction to hear and decide Petitioners' claims and had a duty to stay the entire action per Petitioners' request under this court's explicit *Williamson* instruction until the state court proceedings were complete.

Although *Williamson County's* ripeness requirements have been extended to Due Process and Equal Protection claims as well as Takings claims, the District Court dismissed all of Petitioners' claims despite a lack of subject matter jurisdiction. *See, e.g., Bennis v. Michigan Dept. of*

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[3] *Fields v. Sarasota – Manatee Airport Auth.*, 953 F.2d 1299 (11th Cir. 1992) and *Jennings v. Caddo Parrish School Bd.*, 531 F.2d 1331 (5th Cir. 1976).

Nat. Res., 970 F.2d 154 (5th Cir. 1992); *Unity Ventures v. County of Lake*, 841 F.2d 770 (7th Cir. 1988), *cert. denied*, 488 U.S. 891 (1988); *Herrington v. County of Sonoma*, 857 F.2d 567 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989); *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227 (9th Cir. 1994); *Rocky Mountain Mat. & Asph., Inc. v. Board of County Comm'rs of El Paso County*, 972 F.2d 309 (10th Cir. 1972); *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987). Contrary to Respondent's contention, the Fourth Circuit held that Petitioners had satisfied the first element of *Williamson County's* two-pronged ripeness test, exhaustion of administrative remedies, but somehow, while praising Petitioners for using the *Fields'* reservation for as-applied takings claims, crushed Petitioners' right to proceed first in the state courts. (App. 11).

Petitioners' attempt to negotiate the procedural thicket created by *Williamson County's* ripeness requirement resulted in the premature hearing and dismissal of their claims. This Court's intervention is urgently needed to unravel the conflicting and apparently unmanageable conflict that *Williamson* has produced in the application of its principles.

CONCLUSION

Notwithstanding Respondent's Opposition, a Writ of *Certiorari* should be granted.

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